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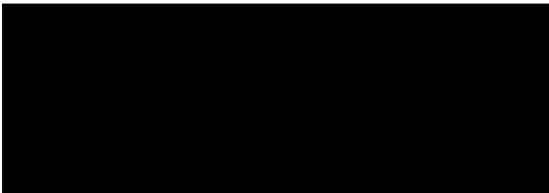
Date: SEP 10 2007

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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).<sup>1</sup> The director determined 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 3, 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.

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 October 23, 1997.

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> On appeal, counsel submits a letter dated April 18, 2005 from [REDACTED], S.A. De C.V. in Tijuana, Mexico regarding the beneficiary's previous work experience, and a letter from the petitioner's owner, [REDACTED], dated March 9, 2005, regarding the beneficiary's previous work experience. Other relevant evidence in the record includes the petitioner's Forms DE-6, California Quarterly Wage and Withholding Reports, for the third and fourth quarters of 2002 and the first and second quarters of 2003, transcripts of the beneficiary's IRS Form 1040A tax returns for 2000, 2001, 2002 and 2003, an IRS Letter 1722 detailing the beneficiary's tax account information for 1999, and IRS Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for 1999, 2000, 2001, 2002 and 2003. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the beneficiary has at least five years of experience as a cook prior to the priority date, as evidenced by the work verification letter from the petitioner submitted on appeal. Further,

<sup>1</sup> This office notes that the Form ETA 750 is a duplicate copy. The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the DOL upon the written request of a consular or immigration officer.

<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).

counsel asserts that the beneficiary has an additional three years of experience as a cook in Mexico, based on the work verification letter from Grupo Leyva, S.A. De C.V. in Tijuana, Mexico submitted on appeal. Thus, counsel concludes that the beneficiary is fully qualified for the proffered job.

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

14.	Education	
	Grade School	blank
	High School	blank
	College	blank
	College Degree Required	blank
	Major Field of Study	blank

The applicant must also have two years of experience in the job offered or two years of experience as a cook in any type of food. The duties of the proffered job 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 on October 12, 1997 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 2, the beneficiary indicated that he resided in Nayarit, Mexico. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked 40 hours per week as a cook for Restaurant El Nayarita in Nayarit, Mexico from May 1992 to November 1997. By amendment dated May 2, 1998, the beneficiary confirms the dates of this employment. He does not provide any additional information concerning his employment background on Form ETA 750B. By amendment dated September 15, 1998, the beneficiary requested that the following work experience be entered on Form ETA 750B at Part 15(b): (1) that he worked as a cook 40 hours per week for El Paso de Tecuala in Tijuana, Mexico from August 1994 to November 1997;<sup>3</sup> and (2) that he worked as a cook 40 hours per week for the petitioner, Ranch House Café, in Olancho, California from December 1997 to the date of the amendment on September 15, 1998.<sup>4</sup>

<sup>3</sup> This office notes that as a result of the amendment, the beneficiary has indicated that he worked two full-time jobs from August 1994 to November 1997 in two cities in Mexico located over 200 miles apart.

<sup>4</sup> This office notes that to be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the priority date, which as noted above, is October 23, 1997. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Therefore, if the beneficiary began

On the Form I-140 petition, filed on December 29, 2003, the petitioner indicated that the beneficiary arrived in the United States in 1990 and that as of the date of filing the petition, the beneficiary did not have a social security number.

With the petition, the petitioner submitted Forms DE-6, California Quarterly Wage and Withholding Reports, for the third and fourth quarters of 2002 and the first and second quarters of 2003. The Forms DE-6 indicate that the petitioner employed the beneficiary in each of the quarters for which Forms DE-6 were submitted. The Forms DE-6 indicate that the beneficiary's social security number begins with the three numbers 611.

In response to the director's request for evidence (RFE) dated December 2, 2004, the petitioner submitted transcripts of the beneficiary's IRS Form 1040A tax returns for 2000, 2001, 2002 and 2003 and an IRS Letter 1722 detailing the beneficiary's tax account information for 1999. The tax information indicates that the beneficiary's social security number begins with the three numbers 915. Further, in response to the director's RFE, the petitioner submitted IRS Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for 1999, 2000, 2001, 2002 and 2003. The Forms W-2 indicate that the beneficiary's social security number begins with the three numbers 611. Further, although specifically and clearly requested by the director in his RFE, the petitioner declined to provide letters of work experience for the beneficiary from the petitioner or any of the beneficiary's other previous employers.

On appeal, counsel submits a letter dated April 18, 2005 from [REDACTED] S.A. De C.V. in Tijuana, Mexico, stating that the beneficiary was employed 40 hours per week as a cook from 1988 to 1991. The petitioner also submitted a letter from its owner, [REDACTED] dated March 9, 2005 stating that the beneficiary has worked 40 hours per week as a cook for the petitioner from 1991 to the date of the letter.

The regulation at 8 C.F.R. § 204.5(1)(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.

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-

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employment with the petitioner in December 1997, this experience would not be eligible for consideration as experience earned prior to the priority date.

92 (BIA 1988). The evidence regarding the beneficiary's prior employment history shows the following inconsistencies: (1) the Form I-140 petition indicates that the beneficiary entered the United States in 1990; however, the beneficiary claims that he was employed as a cook in Mexico from 1992 to 1997, an employment verification letter from an employer in Mexico indicates that the beneficiary was employed as a cook in Mexico from 1988 to 1991, and the Form ETA 750 indicates that he resided in Nayarit, Mexico as of October 1997; (2) the petitioner submits a letter on appeal indicating that it has employed the beneficiary as a cook since 1991; however, the beneficiary indicated on an amendment to Form ETA 750B that he began work as a full-time cook for the petitioner on December 1997, and that he worked for other employers in Mexico prior to that date; and (3) the petitioner, who at the time the petition was filed in 2003 claimed to be the beneficiary's employer, indicated on the petition that the beneficiary did not have a social security number; however, the petitioner's California Forms DE-6 and the beneficiary's Forms W-2 issued by the petitioner indicate that the beneficiary's social security number begins with the three numbers 611, while the beneficiary's tax return transcripts indicate that his social security number begins with the three numbers 915.<sup>5</sup> The petitioner has not resolved these inconsistencies.<sup>6</sup>

This office also notes that 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).<sup>7</sup> 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 its employment verification letter and the letter from Grupo Leyva, S.A. De C.V. in Tijuana, Mexico to be considered, it should have submitted the documents in response to the director's request for

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<sup>5</sup> Further, this office notes that the tax documents in the record, even if accepted by this office as reliable, would only establish that the petitioner employed the beneficiary starting in 1999, after the priority date. They also do not establish that the petitioner employed the beneficiary as a cook.

<sup>6</sup> 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).

<sup>7</sup> The RFE specifically states with regard to the beneficiary's experience:

Records indicate that beneficiary has been employed with petitioner. Submit evidence of experience earned with current employer, Rancho House café. Experience earned should be submitted in letterform on the current employer's letterhead showing the name, address, phone number and title of the person verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.

Further, the RFE states:

Evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.

evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the employment verification letters submitted on appeal.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as a cook 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.