

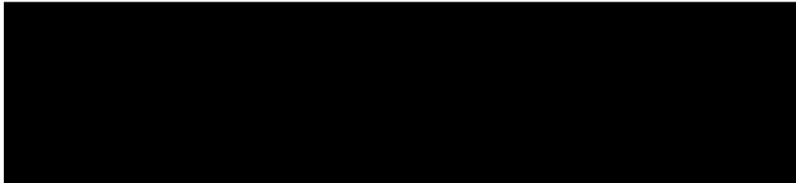
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Office: TEXAS SERVICE CENTER

Date: JAN 02 2008

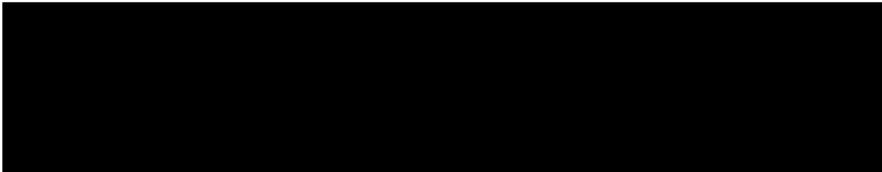
IN RE:

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

The petitioner is a Chinese restaurant business. It seeks to employ the beneficiary¹ permanently in the United States as a Chinese 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 application. The director denied the petition accordingly.

On appeal, counsel submitted additional evidence.

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 acting director's denial dated April 8, 2005, 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 a resident of the State of New York and employed in Louisiana from October 2001 until July 2004.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$465.00 per week (\$24,180.00 per year). The Form ETA 750 states that the position requires two years of experience in the job of Chinese specialty cook or two years of experience in the related occupation of apprentice cook.

The AAO maintains plenary power to review each appeal 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 pertinent evidence in the record, including new evidence properly submitted upon appeal.²

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B,

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.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, with a new ETA Part B for the substitute beneficiary; a letter from counsel dated May 10, 2004; two letters from the petitioner both dated February 18, 2004; a letter on computer generated letterhead dated April 29, 2004, from [redacted] manager of the Golden Wok of Baton Rouge, LLC, of Baton Rouge, Louisiana; the petitioner's restaurant menu; and the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2002 and 2003.

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 Chinese 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	<u>0</u>
College	Blank
College Degree Required	Blank
Major Field of Study	Blank
Training\No. Yrs.\No. Mos.	Blank
Experience\ No. Yrs.\No. Mos.	<u>2\ "or"</u>
Related Occupation \No. Yrs.\No. Mos.	<u>2\Blank</u>
Related Occupation	<u>Apprentice Cook</u>

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).

As stated above, according to the application, the applicant must have two years of experience in the job offered (or two years experience in the related occupation of apprentice cook), 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" stated "Able to utilize the equipment of the Chinese kitchen."

There is no direct evidence in the record of proceeding that the beneficiary has attained six years of grade school education. According to ETA Part B, section 11 the beneficiary stated that he attended and graduated Changle Middle School, Fujian, The People's Republic of China, in a general field of study from September 1967 to June 1970.³

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 full time (40 hours each week) by the Golden Wok of Baton Rouge, LLC, of Baton Rouge, Louisiana as a Chinese specialty cook from October 2001 to present (i.e. May 5, 2004). He does not provide any additional information concerning his employment or training background on that Form.

Since the priority date is March 27, 2001, and the labor certification requires that an applicant for the offered job of Chinese specialty cook have two years cooking experience, the beneficiary has not in the labor certificate stated that he has the prerequisite two years of job experience prior to that priority date.

As already stated, because the director determined, *inter alia*, the evidence submitted was insufficient to show that the beneficiary had the requisite two years work experience, the director on January 7, 2005, requested evidence pertinent to that issue.

Consistent with the requirements of the regulation at 8 C.F.R. § 204.5 (1)(3)(ii), the director specifically requested, *inter alia*, the following:

Also submit documentation which establishes that the beneficiary meets the minimum job requirements as listed on the ETA 750 prior to the priority date from previous employers to include the owner's name, phone number, address and signature.

Also please explain why the beneficiary claims to [be] working in Baton Rouge, LA, however he lists a current address in New York [City].

Counsel submitted a cover letter dated March 29, 2005, a letter on computer generated letterhead dated March 7, 2005, from [REDACTED], manager of the Golden Wok of Baton Rouge, LLC, of Baton Rouge, Louisiana, a letter from the petitioner dated March 20, 2005; the beneficiary's U.S. federal tax returns Form 1040 and Form 1040EZ for the years 2001, 2002, 2003 and 2004 all stating the beneficiary's home address as [REDACTED]

³ It is reasonable to assume that a prerequisite for admission to the middle school is satisfactory attendance of a grade school.

⁴ According to the director all of the beneficiary's work authorizations since 1998 were issued by the Vermont Service Center for the beneficiary with New York addresses.

On his individual tax returns, the beneficiary stated wages of \$1,690.00 and \$3000.00 of "other income"⁵ derived from "casual work" in 2001; in 2002 wages of \$8,345.00 and no "other income;" in 2003 wages of \$9,385.00; and in 2004 wages of \$6,700.00.⁶

Attached to the beneficiary's federal returns are a Wage and Tax Statement (W-2) for 2004 in the amount of \$6,700.00 from the Golden Wok of Baton Rouge, LLC, of Baton Rouge, Louisiana, and three undated, unsigned State of Louisiana Nonresident and Part-year Resident Form 540B returns for 2001 (AGI⁷ stated as \$4605.00), 2002 (AGI stated as \$8,530.00) and 2003 (AGI stated as \$9,385.00).

The March 7, 2005 letter from [REDACTED] stated:

* * *

This is to certify that ... [the beneficiary] worked as a Chinese Specialty Cook in the above named restaurant [i.e. Golden Wok of Baton Rouge, LLC] since October 16, 2001 to June 30, 2004.

The responsibilities of ... [the beneficiary] included the following:

Prepare and cook Chinese specialty dishes and sauces.

[The beneficiary] ... works 40 hours per week and was compensated at the rate of \$800.00 per month.

Counsel submitted a letter from the petitioner dated March 20, 2005, in which [REDACTED] president of Lotus Corporation stated that the beneficiary was a resident of New York from 2001 to 2004 and on the date of his letter was presently a resident of New York. In contradiction to these statements, [REDACTED] then stated in that letter that the beneficiary was working (but did not state the term of employment there or the circumstances) in Baton Rouge, Louisiana but "after he quitted [sic] his job at the Golden Wok since July 1, 2004," the beneficiary moved back to New York.

[REDACTED] letter leaves the acting director's inquiry "... please explain why the beneficiary claims to [be] working in Baton Rouge, LA, however he lists a current address in New York [City]" unanswered.

The acting director issued a denial dated April 8, 2005, with a finding that the petitioner has not 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 Chinese specialty cook (as stated in the labor certification 40 hours each week) and a resident of the State of Louisiana from October 2001 until July 2004.

The petitioner appealed the acting director's decision on May 9, 2005. On appeal counsel stated that the acting director erred because she "completely failed to consider the individual tax return records which clearly show that the beneficiary worked in LA⁸ for the required period."

⁵ Form 1040, line 21.

⁶ Attached to the federal returns are W-2 and State of Louisiana Nonresident and Part-year Resident form 540B returns that will be discussed in turn.

⁷ Federal adjusted gross income ("AGI").

⁸ Louisiana.

Also counsel asserted that it is not uncommon for people to work in one place while keeping residence elsewhere. According to counsel's brief dated May 4, 2005, the beneficiary claimed a New York residence to support a "political asylum application" since 1997 although the beneficiary "works out of state."

As a preface to the following discussion, 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). The unsupported statements of counsel on appeal or in a motion are not evidence and thus 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). 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).

Counsel has submitted a legal brief in the matter and resubmitted the beneficiary's federal returns, the beneficiary's Wage and Tax Statement (W-2) for 2004, and undated, unsigned State of Louisiana Nonresident and Part-year Resident Form 540B returns for 2001, 2002 and 2003.

Accepting for the sake of argument all the petitioner's evidence as submitted, the beneficiary maintained his residence in New York State at a fixed address for four years (New York) while living and working in Baton Rouge, Louisiana at Baton Rouge, Louisiana. There is no explanation as to how the beneficiary maintained two residences while earning \$4.95 per hour/\$800.00 monthly.

According to the beneficiary's personal tax returns submitted (except for 2004) without W-2 or 1099-MISC statements, during the four-year period (from October 2001 to July 1, 2004) the beneficiary earned a total of \$26,120.00 or \$791.52 each month (excluding the \$3,000.00 which is the amount stated received in 2001 earned for unspecified casual labor). That amount is approximately the monthly wage (\$4.95 per hour/\$800.00 monthly) that was stated by of Golden Wok of Baton Rouge, LLC, of Baton Rouge, Louisiana, as paid to the beneficiary.

However, other than one W-2 statement submitted for 2004 and an employment reference by there is no independent objective evidence submitted in the record that the beneficiary was employed by the Golden Wok of Baton Rouge, LLC, in 2001, 2002, or 2003. As indicated, the beneficiary's tax returns for those years (2001, 2002 and 2003) do not provide a W-2 or 1099-Misc statement, or indicate a source of the wages stated on the return.

As stated in the pertinent regulation, 8 CFR § 204.5(l)(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." The letter submitted by does not establish that the beneficiary had two years of experience as a Chinese specialty cook prior to the priority date of March 27, 2001. Instead it details the beneficiary's experience acquired after the priority date from October 16, 2001, to June 30, 2004.

Thus the petitioner has not demonstrated that the beneficiary acquired two years of experience in the job of Chinese specialty cook or two years of experience in the related occupation of apprentice cook prior to March

27, 2001. The petitioner has therefore 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.