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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 05 2007

WAC 00 174 50032

IN RE: Petitioner: [redacted]
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:

[redacted]

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, California Service Center, revoked approval of the employment-based visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. After the petition had been approved the director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and revoked approval of the petition accordingly.

The record contains two Form I-140 petitions, one filed September 16, 1998 and the instant petition, filed on May 22, 2000. Today's decision concerns only the May 22, 2000 petition.

On the Form I-290 appeal counsel stated that he represents the beneficiary. The beneficiary is not an affected party, 8 C.F.R. § 103.3(a)(1)(iii), and neither the beneficiary nor his attorney or representative is permitted to file an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). However, the record contains a Form G-28 Notice of Entry of Appearance executed by a representative of the petitioner recognizing counsel as its attorney in this matter. The record shows, therefore, that the appeal was properly filed. The appeal was also timely and makes a specific allegation of error in law or fact 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 revocation the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Section 205 of the Immigration and Nationality Act (the Act) 8 U.S.C. 1155 provides, in pertinent part,

> The attorney general may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under Section 204. Such revocation shall be effective as of the date of approval of any such petition.

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 or seasonal nature, for which qualified workers are unavailable 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.

Eligibility in this matter hinges on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 17, 1998. The labor certification states that the position requires three years of experience in the job offered.[1]

On the Form ETA 750, Part B the beneficiary, who signed that form on December 2, 1997, stated that he had worked full-time for Angelo's Restaurant in Incline Village, Nevada, as a cook/baker from June 1989 to January 1993; and full-time for the petitioner as a baker/dough maker from August 1993 to the date he signed that form.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification . . . ." The beneficiary listed no other experience on that form.

This office notes that those two employment claims overlap. That is, the beneficiary claims to have worked full-time for both companies from August 1993 through October 1993. Although this is possible it is unlikely.

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 pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See 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.[2]

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[1] To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service 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 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

[2] 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

In the instant case the record contains (1) a photocopy of an unsigned employment verification letter dated October 31, 1997, (2) an employment verification letter dated December 12, 1999, (3) a June 9, 2004 employment verification letter, and (4) a declaration dated August 9, 2005. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

The June 9, 2004 employment verification letter is from [redacted], who states that she was previously co-owner of Angelo's Italian Kitchen in Incline Village, Nevada. She states that she and her husband owned the restaurant business and the property and operated it at various times, including from the summer of 1991 to the summer of 1994. She stated that the beneficiary was the first employee they hired during that period, but does not state when his employment ended. She also stated that, during her restaurant's final year, the beneficiary took an additional job at a bagel business.

The unsigned October 31, 1997 employment verification letter is from [redacted] and [redacted] of Las Vegas, Nevada. They stated that the beneficiary began working for them in 1989 and remained with them until they closed in 1994. They stated that he worked first as a dishwasher but was promoted to baker.

The December 12, 1999 employment verification letter is also from [redacted] and [redacted]. They state that the beneficiary was their first employee at their restaurant, [redacted]' in Incline Village, Nevada, when they opened in 1989 and that he remained with them until they closed in 1994. The letter states that the beneficiary was originally a cleaner/dishwasher but rose to the position of baker.

This office notes that the employment verification letters state that the beneficiary worked for the petitioner until it closed in 1994. The beneficiary stated that he worked for Angelos Restaurant until October 1993. Again, doubts raised by inconsistencies in the evidence must be resolved with independent objective evidence.

The August 9, 2005 declaration is also from [redacted] and [redacted], who state that they intermittently operated a restaurant in Incline Village.[3] They state that the restaurant closed after the 1994 summer season, and, "This would have been September/October 1994." They state that they hired the beneficiary during 1991 as a dishwasher/cleaner, but he was promoted within six months. The letter states that the beneficiary was

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I&N Dec. 764 (BIA 1988).

[3] 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).

promoted to his position as a baker at some unspecified time during 1991 and remained in that position until the unspecified date during September or October of 1994 when the restaurant closed. Mr. and Mrs. [redacted] estimate that his employment as a baker spanned approximately 39 months.

The [redacted] state that the beneficiary was paid by check with proper withholding, but that all records have since been destroyed. Finally, the [redacted] state that the information on the December 12, 1999 employment verification letter is "true and correct." They declared, "We stated the truth originally, it has not changed, and it is still the truth."

The two declarations by the [redacted], however, are mutually contradictory. In the December 12, 1999 letter [redacted] stated that the beneficiary began to work in their restaurant during 1989. In the August 9, 2005 declaration both of the [redacted] stated that the employment began during 1991.

Again, discrepancies in the evidence can only be reconciled with independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

On March 14, 2001 the service center issued a request for evidence seeking additional evidence in support of the beneficiary's claim of qualifying employment. In response the petitioner submitted an additional copy of the December 12, 1999 employment verification letter.

The Director, California Service Center, approved the petition on June 5, 2001.

On June 9, 2004, pursuant to a review of the beneficiary's Form I-485 Application to Adjust Status, the Reno, Nevada Sub-Office issued a request for evidence pertinent to the beneficiary's claim of qualifying employment.

On July 29, 2004, also pursuant to a review of the beneficiary's adjustment of status application, the Reno, Nevada Sub-Office issued a request for additional evidence pertinent to the beneficiary's claim of qualifying employment.

On July 26, 2005 the service center issued a Notice of Intent to Revoke in this matter, citing conflicting information.[4]

In his response, dated August 2005, counsel stated that the beneficiary's employment verification letter from the former owners of Angelo's Restaurant establishes that the beneficiary worked for them from 1989 until 1994. Counsel stated that, in requiring supporting documentation CIS is exceeding the requirements of 8 C.F.R. § 204.5(l)(3)(ii). With that response counsel submitted the August 9, 2005 declaration of Mr. and Mrs. [redacted], the former owners of Angelo's Restaurant.

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[4] The Notice of Intent to Revoke also states that at the beneficiary's adjustment interview the interviewer determined that the evidence does not support the beneficiary's conclusion. This office will consider the evidence in the record, but, absent any explanation of the interviewer's reasoning, will not consider the interviewer's conclusory opinion.

On September 29, 2005 the service center issued another request for evidence, noting that the petitioner is obliged to demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification, and requesting documentary evidence in addition to the employment verification letters.

The director revoked approval of the petition on January 19, 2006. On appeal, counsel asserted that the evidence submitted demonstrates that the beneficiary is qualified for the proffered position.

Counsel disputed the assertion in the decision of revocation that the employment verification letters were "self-serving." This office concurs that use of that phrase was, at best, poor diction. No reason exists that employment verification letters submitted may not appropriately accord with the interests of the petitioner and the beneficiary. The issue is whether they sufficiently support the beneficiary's claim of qualfying employment.

Counsel also stated,

> Neither the [director's] decision nor the intent to revoke state [sic] exactly what the grounds of revocation are! However, it is assumed that the [director] is revoking the petition because the interviewing office found that the alien could not establish his prior work experience.

Counsel's statement demonstrates that the notice of intent to revoke and the decision of denial were sufficiently clear that he apprehended the basis for the revocation of approval. As such, the wording was clear enough that it did not constitute reversible error.

Counsel stated that in Nevada the county or city licenses a business, rather than the state. Counsel appears to fault the director for not seeking evidence in support of the beneficiary's employment claim at the municipal level.

Supporting the beneficiary's claim of qualifying employment experience is the burden of the petitioner and counsel. The director was under no obligation to seek evidence to support the employment claim or other aspects of the petitioner's case. Counsel was free, and even encouraged, to provide evidence in support of the employment claim. Counsel, not the director, was obliged to provide whatever evidence was necessary to support his client's case.

The regulation at 8 C.F.R. § 103.2(b)(8) requires a request for evidence if some portion of the requisite initial evidence is missing or if the evidence submitted does not fully establish eligibility. If the petitioner had neglected to submit some portion of the required initial evidence, employment verification letters, for instance, then the service center would have been obliged to issue a request for evidence. The director found, however, that the evidence was complete, but showed that the petition was not approvable. No request for evidence was required in the instant case.

Even if a request for evidence were required the failure to issue it would be harmless error. Counsel was afforded, on appeal, an opportunity to provide additional evidence or argument pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The opportunity to submit

additional evidence would have rendered moot the failure of the service center to issue a request for evidence even if issuance of such a request were required.

The beneficiary stated on the Form ETA 750B that he worked for Angelo's Restaurant from June 1989 to January 1993. Mrs. [redacted] stated in her June 9, 2004 employment verification letter, that the restaurant was open from the summer of 1991 to the summer of 1994, that the beneficiary was the first employee they hired during that period, and further implied that he remained with them until the summer of 1994. Mr. and Mrs. [redacted] stated in the October 31, 1997 employment verification letter that the beneficiary began working for them in 1989 and remained with them until they closed in 1994. In the December 12, 1999 employment verification letter they again stated that they hired the beneficiary when they opened in 1989 and that he remained with them until they closed in 1994. In the August 9, 2005 declaration they state that they hired the beneficiary during 1991 and promoted him from dishwasher to baker during that year, that he remained with them until September or October of 1994, and that his employment as a baker spanned approximately 39 months.

The various employment claims conflict. The beginning and ending dates of the beneficiary's employment at Angelo's Restaurant are critical to demonstrating that he has the requisite three years of qualifying employment experience. In the instant case, considering the various contradictions pertinent to those dates, the director was correct in insisting on additional evidence and in revoking approval of the petition unless the evidence was sufficiently credible. In view of those contradictions, this office would be unlikely to accept as credible any evidence that was not either produced by or produced for a government entity contemporaneously with the claimed employment.

A valid reason exists that the beneficiary's former employer may have destroyed the records of that employment. The restaurant at which the beneficiary worked no longer exists. This office knows of no reason why the former owners, after the passage of more than a decade since that closure, are obliged to retain records.

That the former employer is no longer required to retain records, however, does not release the petitioner from the obligation of credibly demonstrating that the beneficiary has the evidence that the labor certification states is a requirement of the proffered position. The petitioner has failed to provide evidence sufficiently credible to support the employment experience claim, and the petition may not be approved.

No independent objective evidence, as is required by *Matter of Ho, Id.*, was submitted to explain the inconsistencies in the employment verification letters. As such, the evidence submitted does not demonstrate credibly that the beneficiary has the requisite three years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The director had good and sufficient cause to revoke approval of the petition on this ground, which ground has not been overcome on appeal.

The record suggests additional issues that were not addressed in the decision of revocation.

The date on which the beneficiary ceased working as a dishwasher and started working as a baker is unclear. Further, the letters from the beneficiary's alleged former employer indicate that he performed a variety of duties at that restaurant. What percentage of the beneficiary's duties were as a baker is unclear. Even if the beginning and ending dates of the beneficiary's claim of employment at Angelo's Restaruant were

established, the employment verification letters would not make clear that the experience the beneficiary gained there constitutes the equivalent of three years of full-time experience as a baker.

Further, the beneficiary's claimed employment was in Incline Village in the Lake Tahoe area of Nevada, a recreational resort area. In her June 9, 2004 letter Mrs [redacted] stated that she and her husband operated the restaurant "at various times over the past 20 years." In their August 9, 2005 declaration[5] the beneficiary's alleged former employers stated that they "operated a restaurant intermittently in Incline Village." This raises the issue of whether the beneficiary's employment was seasonal. If the beneficiary's employment was seasonal then it may not have constituted the equivalent of three years of full-time employment, even though the employment was full-time during the seasons when the restaurant operated.

Because the decision of revocation did not discuss those additional issues and the petitioner has not been accorded the opportunity to address them, today's decision does not rely on them. If the petitioner attempts to further pursue this matter, however, it should address those issues.

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.

[5] In his brief, counsel indicated that the former employers' declaration is an affidavit sworn under oath. This office perceives no indication that counsel's assertion is correct.