U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 10 2007

WAC 03 049 51216

IN RE: Petitioner:
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:

SELF-REPRESENTED

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 employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's Form I-1485, Application to Adjust Status interview, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR) on February 4, 2006. In a Notice of Revocation (NOR) dated April 13, 2006, the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) and invalidated the Form ETA 750. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], 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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The petitioner is a food processing and manufacturing company. It seeks to employ the beneficiary permanently in the United States as a garde manager Supervisor/Sous Chef.[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. In his revocation decision, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the petitioner had not provided sufficient evidence to establish that the beneficiary had the requisite two years of

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[1] The title of the proffered position varies throughout the record. The petitioner on the Form ETA 750, Part A described the job title as Grade Manager/Sous Chef, while the DOL classification for the position is noted as Manager, food service. (Code: 187.167.106) The job duties include the preparation of food including appetizers and cold food. The record suggests that the actual title is garde manger/sous chef. The petitioner in a letter dated March 1, 2006, sent in response to the director's NOIR, described the beneficiary's extensive knowledge in advanced Garde Manger "including centerpiece carvings." The beneficiary's letter of work verification written by [redacted] Human Resources Coordinator, Arizona Biltmore Resort & Spa, refers to the beneficiary's position there as Garde Manager/Sous Chef. The word garde manger defines a person in charge of a cool well-ventilated pantry area usually in hotels and large restaurants where cold buffet dishes are prepared and other foods are stored in refrigerated units. *See* garde manger, at http://www.epicurious.com/cooking/how-to/food-dictionary (available as of August 2, 2007). The Department of Labor (DOL) *Dictionary of Occupation Titles* (DOT) identifies a garde manger (hotel & restaurant) with the alternate title of cold-meat chef. The DOT code for the garde manger position is 313.361.034. If the petitioner pursues the petition any further, the position title and classification should be clarified.

experience in the actual job or in the related occupation of manager or supervisor in food industry prior to the 2001 priority date. The director revoked the petition's approval 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 April 13, 2006 revocation, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Act 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. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.)

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 February 22, 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.[2] On appeal, the petitioner submits a statement with regard to specific questions raised by the director in his revocation of the petition's approval. The petitioner also resubmits the initial letter dated September 23, 2002 submitted by [redacted], Human Resources, Coordinator, with regard to the beneficiary's work experience at the Arizona Biltmore Resort and Spa, as well as a more recent letter from [redacted] dated May 5, 2006. In this letter, [redacted] states that the letter dated September 23, 2002 stating the dates of the beneficiary's employment with The Arizona Biltmore contains her signature.

The petitioner also submits a copy of correspondence sent by the petitioner to the human resources department, Levy Restaurant Group, Chase Field, Phoenix, Arizona, dated May 24, 2006. In his letter, the petitioner stated that it had noticed that the ETA 750 application did not include the period of time the beneficiary was employed at Bank One Ballpark and America West Arena. The petitioner requested that Levy Restaurant Group provide the petitioner with written verification of the beneficiary's period of employment at Bank One Ballpark.

The petitioner also submits a letter from [redacted], Assistant Registrar, Scottsdale Culinary Institute, and a copy of the beneficiary's transcript of classes attended at the Institute from February 24, 1997 to May 14,

[2] 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).

1998. This transcript includes mention of an externship course with the grade noted as "p". In her letter, Ms. [redacted] stated that the beneficiary is a graduate of Scottsdale Culinary Institute and has an Associate of Occupational Studies in Culinary Arts as of May 15, 1998. [redacted] further notes that the beneficiary attended Scottsdale Culinary Institute as a full-time student from February 24, 1997 to May 15, 1998.

The petitioner also submits a letter from [redacted], Phoenix, Arizona, who identified himself as the catering chef of then Bank One ballpark and as the person who hired the beneficiary to work at Bank One ballpark from December 1997 to October 1998. [redacted] stated that the beneficiary was his lead chef in the cold food area at the Bank One ballpark and American West Arena, and that they both were employed by Restura, which is a Viad company.

The record also contains a letter submitted by [redacted], the petitioner's president, in response to the director's NOIR. In his letter dated March 1, 2006, [redacted] stated that he was not aware that the beneficiary had deficient work experience when the I-140 petition was submitted as he included the beneficiary's internship with the Arizona Biltmore Resort & Spa with his other work experience there. Mr. [redacted] submitted photographs of the types of foods produced by the petitioner, namely small canapés and hors d'oeuvres and center pieces. The petitioner also submitted a letter from [redacted], dated March 2, 2006. In his letter, [redacted] identifies himself as the chef, Arizona Biltmore Resort and Spa. He states that the beneficiary worked as an unpaid intern prior to his official job with the Resort starting in September 1998. [redacted] also stated that he spoke with [redacted] over whether she had provided the initial letter of work verification, and that she had said that she did sign the letter although she did not look at the period of employment on the letter that was typed by her assistant. [redacted] then stated that when Citizenship and Immigration Services contacted [redacted] she felt that the letter of work verification needed to be accurately provided according to the previous employment records, and so she refused to sign another letter of work verification that included the beneficiary's six month work experience from Mary 1998 to September 1998 as an intern. [redacted] stated that the beneficiary's job duties as an intern were the same job duties had when he began paid employment. [redacted] stated the beneficiary had to work 40 hours a week and his duties included coordinating and managing food service activities as well as being responsible for preparing appetizers, and cold food.

On appeal, [redacted] the petitioner's president, asserts that the revocation of the I-140 petition's approval is based on a misunderstanding of the work history/dates of employment provided by the Arizona Biltmore Resort and Spa, some confusion caused by the letter signed by [redacted], and possibly the poor advice provided by former counsel. [redacted] states that he has compiled most of the documentation required including a letter verifying that [redacted] did indeed sign the letter in question in 2002, and documentation of the beneficiary's two years of work experience, education, and training required by the beneficiary prior to the submission of the petition.

states that the petitioner had attempted to obtain verification of the beneficiary's previous employment with Bank One Ballpark and America West Arena; however the human resource department for Bank One Ballpark (now Chase Field) told him that they did not have information on employment when the ballpark was managed by another organization. For this reason, [redacted] submits the letter from [redacted], the beneficiary's supervisor while working at Bank One Ballpark. According to [redacted], the beneficiary also worked for Prep Chef, Inc D/B/A/ James Gerard Foods, the predecessor of the current petitioner, from August 1997 until January 1998.

then states that the beneficiary has a combination of 42 months of direct job history and experience, educational training, and certification in culinary arts that consist of the following:

Scottsdale Culinary Institute, Certification Program	9 months
Arizona Biltmore, Employee Status	18 months
Prep Chef, Inc.	5 months
Bank One Ballpark/America West Arena	10 months

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 garde manger supervisor/sous chef.. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	4
	College	2
	College Degree Required	Associate Degree
	Major Field of Study	Restaurant management or related field

The applicant must also have 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, or two years of work experience in the related occupation of "manger or supervisor in food industry." The petitioner, on Item 15 of Form ETA 750A did not state any further 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 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he attended the Scottsdale Culinary Institute, in Scottsdale, Arizona, studying culinary arts and sciences, restaurant management from February 1997 to May 1998, earning an Associate degree.

On Part 15, Form ETA 750, Part B, eliciting information of the beneficiary's work experience, the beneficiary stated that from March 2000 to the date he signed the Form ETA 750, namely January 25, 2001, he was a student. He further stated that he worked at the Arizona Biltmore Resort and Spa Phoenix, Arizona, as a Grade Manger/Sous Chef from March 1998 to March 2000, and that from June 1996 to June 1999 he worked fulltime as a cook at Bank One Ballpark, Phoenix, Arizona. He does not provide any additional information concerning his employment background prior to the 2001 priority date on that form.

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes 2 years of college, with an associate

degree in restaurant management or a related field, and two years of work experience in the proffered job or as a "manger or supervisor in food industry." The Form ETA 705, Part A required no minimum training in the proffered position.

In his revocation of the petition's approval, the director described a conversation held by CIS with Ginny Flexman, Human Resources Coordinator, Arizona Biltmore Resort & Spa, on December 13, 2005. The director stated that Ms. Flexman verified that the beneficiary worked at the Arizona Biltmore but only from September 1998 through March 31, 2000, a period of approximately eighteen months. The director also noted that the signature on the letter originally submitted by the petitioner as to the beneficiary's employment with the Arizona Biltmore varied significantly from her signature on the first letter submitted to the record. Because the beneficiary had indicated that he worked for two years with the Arizona Biltmore and [redacted] second letter indicated that he had worked with them for 18 months, the director determined that the beneficiary had misrepresented his work experience and that this misrepresentation was material to the approval of the labor certification.

The director then noted that in response to his NOIR, the petitioner submitted a letter that referenced the beneficiary's internship and other work experience as evidence of the beneficiary's qualifications. The director noted that no objective evidence was submitted to corroborate the beneficiary's internship or other work experience.

The petitioner did not clearly establish whether it was filing the instant petition under the employment-based professional or skilled worker classification; however, the petitioner clearly delineated two years as the required number of years required for the associate's degree listed on the Form ETA 750A. Since the minimum educational level is a two year associate degree, the proffered position is considered a skilled worker position.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

> 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.

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. Thus, the beneficiary must have a two year associate's degree, and two years of relevant work experience.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a two year associate's degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of a two years

associate's degree. The record reflects that the beneficiary has a one year associate's degree based on studies from February 24. 1997 to May 14, 1998, a period of 15 months. His studies therefore do not meet the minimum qualifications with regard to educational credentials as stipulated on the Form ETA 750.

With regard to the beneficiary's claimed work experience, the dates of his employment at Bank One Ball park and the dates of his employment at the Arizona Biltmore Resort & Spa vary in the evidence submitted to the record. Based on the second letter submitted to the record by [redacted] the beneficiary worked from September 1998 to March 2000 as an employee. Although the petitioner submitted a letter from [redacted] chef of the Arizona Biltmore Resort and Spa, stating that the beneficiary worked fulltime for the Arizona Biltmore Resort and Spa as an unpaid intern for six months prior to his employment, the petitioner submitted no further documentation as to any internship arrangement between the Scottsdale Culinary Institute and the Arizona Biltmore Resort and Spa in which the beneficiary participated. 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)). Therefore the AAO cannot determine what weight, if any, to give the beneficiary's claimed six month externship with the Arizona Biltmore Resort and Spa.[3]

Furthermore the claimed work experience with Bank One Ballpark listed on the Form ETA 705 varies from the letter of work verification the petitioner submits to the record on appeal. In his letter, Mr. Higgins, the beneficiary's former supervisor, stated that the beneficiary worked for him from December 1997 to October 1998, while the Form ETA 750 indicates the beneficiary worked fulltime for Bank One Ballpark from June 1996 to June 1999.[4] *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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." Although [redacted] on appeal also states that the beneficiary worked for the predecessor of the instant petitioner for five months from August 1997 to August 1998, these dates overlap with the dates indicated on the Form ETA 750, Part B, for the beneficiary's fulltime employment at Bank One Ballpark. Furthermore, [redacted]'s assertion that the predecessor to the instant petitioner employed the beneficiary does not constitute evidence. The assertions of the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Of more probative weight for any claimed employment experience at the Arizona Biltmore Resort and Spa or BallOne Park would be copies of cancelled paychecks, or W-2 forms.

The beneficiary was required to have a two year associate's degree on the Form ETA 750. Based on the beneficiary's educational documentation, namely, his diploma from Scottsdale Culinary Institute, he does not possess a two year associate's degree. Furthermore, with regard to relevant work experience prior to the 2001 priority year, the petitioner has presented documentation that differs from the information provided on the petitioner's Form ETA 750. Based on the documentation submitted by the Arizona Biltmore Resort and Spa, the petitioner has established that the beneficiary worked for the Resort and Spa from September 1998 to

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[3] The AAO does note that the beneficiary's transcript of studies from the Scottsdale Culinary Institute does list an externship for apparently 15 credit hours; however, there is not indication of any grade given to any such internship.

[4] The AAO notes that this period of time includes the entire time of the beneficiary's full time studies at the Scottsdale Culinary Institute, namely, from February 1997 to May 1998.

March 2000. Due to the conflicting dates of employment presented in the two letters of work verification submitted by the Arizona Biltmore Resort and Spa, the beneficiary either worked 18 months as a fulltime paid employee or 24 months, with 18 months in fulltime employment status, and the remaining six months as an unpaid intern. The petitioner has not provided any documentation on the claimed internship from either the Arizona Biltmore Resort and Spa or the Scottsdale Culinary Institute that would establish the exact nature of the internship. While training such as internships can be considered towards the requisite period of work experience stipulated on a Form ETA 750, the petitioner has not provided probative and sufficient documentation that the beneficiary participated in such an internship, or the length of time he participated in such an internship. Furthermore, as previously stated, the petitioner has not established that the beneficiary has a two year Associate's Degree in a relevant course of studies, as stipulated by the Form ETA 750. Based on the record as presently constituted, the petitioner has not established that the beneficiary has either a two-year Associate's Degree in restaurant management or a related field, and two years of prior work experience or training as a garde manger/sous chef.

In sum, the director does appear to have good and sufficient cause to revoke the instant petition, pursuant to Section 205 of the Act, 8 U.S.C. 1155 and as discussed in *Matter of Estime*, 19 I&N 450 (BIA 1987)). Therefore the director's decision to revoke the petition dated April 13, 2006 shall stand, and the appeal will be dismissed.

The director in his decision also determined that the petitioner had not established that the beneficiary had the two years of relevant work experience stipulated by the Form ETA 750 and invalidated the Form ETA 750. The director cited 20 C.F.R.§ 656.30(d) that states in pertinent part:

> After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies procedures or by a court of fraud or willful misrepresentation of a material fact involving the labor certification application.

Upon review of the record, the petitioner does not appear to have committed fraud or to have willfully misrepresented any material fact in the present proceedings. As stated previously, the petitioner has not provided sufficient evidentiary documentation to establish that the beneficiary has the requisite two years of relevant work experience, either in a paid position or in an internship position as a garde manger supervisor/sous chef stipulated on the Form ETA 750. Furthermore neither the director nor the petitioner has addressed the issue of the requisite two year associate degree. While the record in these proceedings reflects lack of relevant documentation, and confusion as to the nature of the claimed internship, the AAO does not find such deficiencies to be the equivalent of fraud or the willful misrepresentation of material facts. The AAO thus does not affirm the director's determination with regard to the invalidation of the petitioner's Form ETA 750 based on fraud or misrepresentation.

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. The appeal is dismissed.

ORDER: The appeal is dismissed.