U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 0 2 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by an ETA Form 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 4, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date and that the petitioner did not demonstrate the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains lawful permanent residence because the petitioner did not demonstrate that it was the same entity as that for which financial documentation was provided.

The record shows that the appeal is properly filed 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On appeal, counsel submits a brief; a letter dated May 6, 2009 from , Certified Public Accountant; a Certificate from the State of Ohio which reflects the registration of a trade name dated June 23, 2004; a copy of the application for the registration of a trade name dated June 14, 2004; a Certificate from the State of Ohio which reflects the amendment of the Articles of Incorporation for dated November 13, 2006; a copy of the application for Certificate of Amendment by Shareholders or Members dated November 13, 2006; a copy of the

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

[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 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).

Amended Articles of Incorporation for Cleveland Express Restaurant, Inc. dated October 1, 2006; copies of the U.S. Income Tax Return for an S Corporation for (Form 1120S) for 2004, 2005, 2006, 2007 and 2008; copies of the Ohio Notice of S Corporation Status (Form FT 1120 S) for for 2005, 2006, 2007, 2008 and 2009; and a copy of a Korean document entitled, Notorial Certificate, attesting to work experience dated February 18, 2004 with translation.

On appeal, counsel asserts that the beneficiary worked as a head chef at and that, "as a head chef, it is reasonable to expect that he/she would know how to prepare Chinese food."

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition, March 4, 2004. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) 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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: None specified
High School: None specified
College: None
College Degree Required: Not applicable

Major Field of Study: Not applicable
TRAINING: None Required.
EXPERIENCE: Two (2) years in the job offered
OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a Chinese specialty cook with Korea from June 1992 until December 1994. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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 record contains a notarized certificate, from stating that the company employed the beneficiary as a head cook (chef) from June 1, 1992 until December 31, 1994. However, the document provided is not a letter from the employer, drafted on company letterhead. The individual whose attestation appears on the document does not identify his or her position with the employer, other than to state that he or she is a representative of the restaurant. The certificate does not identify the duties which the beneficiary performed and does not indicate whether the beneficiary worked on a full-time or part-time basis.

On January 6, 2009, the director issued a request for evidence (RFE), citing some of the deficiencies with the notarized certificate and afforded the petitioner an opportunity to supply a letter which complies with the regulatory requirements set forth at 8 C.F.R. § 204.5(l)(3)(ii)(A). The service center received a response to the director's RFE on February 23, 2009. In its response, the petitioner supplied another copy of the same notarized certificate but no other evidence of the sort requested.

On appeal, counsel again provides a copy of the same letter which was supplied with the initial petition submission and with the petitioner's response to the director's RFE. Counsel, however, provided no new evidence which complies with the regulatory requirements and which substantiates the beneficiary's claimed employment experience. On appeal, counsel asserts that the duties associated with the proffered position are set forth on Form ETA 750, in Item 13 and these are: "to prepare all types of Chinese foods including appetizers, soups and desserts." Counsel further asserts that the beneficiary worked as a head chef in and that "as a head chef, it is reasonable to expect that he/she would know how to prepare Chinese food."

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) is clear. 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.

Counsel's assertion that the beneficiary was a head chef and that as a head chef in a Chinese restaurant, he would know how to prepare Chinese food does not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

The deficiencies in the evidence submitted to substantiate the beneficiary's claimed experience have been articulated above. The director noted such deficiencies in his RFE and afforded the petitioner an opportunity to provide additional evidence in support of the beneficiary's claimed experience and which would overcome the deficiencies cited in the existing evidence. In responding to the director's request, the petitioner failed to supply the requested evidence but simply resubmitted the evidence which it initially submitted.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide evidence of the beneficiary's claimed experience which complies with the requirements at 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The AAO, therefore, affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

As set forth in the director's April 17, 2009 denial, the second issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification,

was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on March 4, 2004. The proffered wage as stated on the Form ETA 750 is $1,980 per month ($23,760 per year).

In the instant case, the director determined that the petitioner had not demonstrated the continuing ability to pay the beneficiary the proffered wage from the priority date onward because it provided no financial documentation which demonstrated its specific ability to pay. The petitioner provided copies of U.S. Income Tax Returns for an S Corporation (Form 1120S) for However, the director determined that the petitioner did not demonstrate that it and were one and the same entity.

Form ETA 750 and Form I-140 were both filed by In Part A of Form ETA 750, under the name of the employer, the company name is Next to the employer name is the Employer Identification Number (EIN): The business address which appears on Form ETA 750 is In Item 7, under the address where the alien will work, the employer indicated 393 Stoneridge Lane, Ghanna [sic], OH . In Part 1 of Form I-140, the entity which filed the petition did not include an EIN but identified the business address as In Part 6 of Form I-140 the petitioner did not identify a separate address at which the beneficiary would work, thereby indicating that the work address is the same as the business address: , OH .

As evidence of the ability to pay, the entity which filed Form I-140 provided copies of the U.S. Income Tax Return for an S Corporation (Form 1120S) for for 2004 and 2005; copies of the Ohio Notice of S Corporation Status (Form FT 1120 S) for for 2005 and 2006; copies of Business Income Tax Returns for for 2004 and 2005; and copies of the Return of Taxable Business Property For for 2004 and 2005.

On January 6, 2009, the director issued an RFE, asking the petitioner to provide, among other things, documentary evidence demonstrating that and are one and the same business entity. The director noted that if the petitioner and are not the same entity, then the petitioner would have to provide documentary evidence of its ability to pay. In response, the petitioner provided a copy of the liquor license for

The director appropriately denied the petition, finding that the petitioner had not demonstrated that and were one and the same entity. In his decision, the director noted that the liquor license provided as evidence indicates that the corporation, does business as The director found no mention of in the evidence and found that the business

address identified on Form I-140 was different than the address identified on both the liquor license for Cleveland Express Restaurant, Inc. and the tax returns submitted as evidence.

On appeal, counsel asserts that initially did business as and operated from Ohio; and that it was incorporated as a Sub-chapter S Corporation in January 2004, having a Federal Employer Identification Number: . Counsel further asserts that in 2005, the petitioner moved its restaurant to a different location within the same strip mall, the new address being , Ohio. Counsel further asserts that after the move, Inc. changed its operating name from to As evidence of the name change, counsel refers to a Certificate of Trade Name which was provided as evidence on appeal. However, the registration of the trade name is dated June 10, 2004, conflicting with counsel's assertion that the petitioner moved in 2005 and changed its name after the move.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO, therefore, finds that the director rendered his decision correctly since he issued an RFE, affording the petitioner an opportunity to provide evidence (e.g. evidence of a merger or legal name change) demonstrating either that it had the ability to pay the beneficiary the proffered wage or that it and were, at the time of the filing, one and the same entity. In the response to the director's RFE, counsel for the petitioner made no mention of any relationship between (the petitioner) and Rather, counsel simply referred to a liquor license provided as evidence, the liquor license having been issued to Counsel failed to explain the relationship between and provided no explanation for this omission.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner provided no evidence demonstrating the relationship between the petitioner and The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, counsel provides documents, such as the State of Ohio Certificate of registration of a trade name which indicates that registered the trade name, Asian

This document bears the business address OH. Counsel also provided a Certificate from the State of Ohio dated November 13, 2006 which is entitled "Domestic / Amended Restated Articles." This document identifies the Articles of Incorporation of but does not contain a business address or fictitious trade name. Further, the document is an amendment to the Articles of Incorporation for but counsel does not explain the nature of the amendment, the amendment having been made more than one year after was supposed to have moved from On appeal, counsel provides copies of the U.S. Income Tax Return for an S Corporation for (Form 1120S) for 2004, 2005, 2006, 2007 and 2008, all of which contain the business address OH. Each of the tax returns indicates an effective date of election as an S Corporation as January 1, 2004. On appeal, counsel provides copies of the Ohio Notice of S Corporation Status (Form FT 1120 S) for for calendar year 2004, 2005, 2006, 2007 and 2008. Each of these documents bears the corporation name, and the business address , OH. None of the documents bears a fictitious trade name.

None of the documents provided on appeal contains the name and none mention the change of either the corporation name or the fictitious trade name. A review of all documentation in the record of proceeding reveals one document which contains the name The Return of Taxable Business Property for calendar year 2004 contains a taxpayer name of and a business name of However, the business address is identified as OH. No other document in the record of proceeding contains the name and the petitioner has provided no documentation to demonstrate that the petitioner underwent a name change from to any other trade name.

Within the U.S. Tax Return for an S Corporation (Form 1120S) for 2004, the petitioner included an addendum entitled, "Note to form 1120S, Line 23a. Therein, Mr. CPA and preparer of the return states:

> The taxpayer was a "C" corporation during the year 2003 and had a credit balance of $14842.09, which was subsequently credited to tax year 2004. Since the corporation no longer is required to pay taxes for being an "S" corporation, we request that the credit balance forwarded to the sole shareholder's personal account as follows:
>
> SSN:

In his brief, counsel for the petitioner states, "please note that DBA originally located at Ohio, was incorporated as S. Corporation in January 2004 having a Federal Identification No. of Mr. is the sole 100% shareholder and President of the corporation since January 2004."

Though counsel for the petitioner asserts that the petitioner changed its name after moving from one part of a strip mall to another location within the same strip mall sometime in 2005, this simple assertion does not correspond with the documentary evidence which seems to indicate that an entity had been operating as a C Corporation but then reorganized as an S Corporation in January 2004. The evidence further suggests that the S Corporation had different ownership than the C Corporation, since counsel mentions that Mr. has been the sole shareholder since January 2004. The evidence does not indicate, however, whether was a name associated with the C Corporation or the S Corporation. Further, the evidence indicates that was (re)organized as an S Corporation in January 2004 and that it filed to register the fictitious trade name, , in June 2004. The petitioner nowhere explains why would have filed Form I-140 when, at counsel's own admission, this name had not been in use since sometime prior to June 2004. In other words, an entity named filed Form I-140 in June 13, 2007 when such an entity did not exist.

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: *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has provided no objective evidence which clarifies the inconsistencies identified above.

Given these unresolved inconsistencies, the petitioner has not demonstrated that the entity which filed Form I-140, and were one and the same entity at the time Form I-140 was filed.

It must also be mentioned that Form I-140 was filed on June 13, 2007, using the petitioner name In Part 1, the entity indicated that the business address was In Part 6 of Form I-140, the entity which filed the petitioner provided no separate address at which the beneficiary would work, thereby signifying that the beneficiary would work at the business address contained in Part 1: , OH . In Part 8, owner of the petitioning entity signed the petition, certifying, "under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct."

If counsel's assertions that had formerly done business as and had operated from OH but moved from that location in 2005 (or 2004) and changed its name after moving are true, then at the time the instant petition was filed China Gourmet Restaurant did not exist and neither nor was operating from OH. Thus, when the petitioner filed form I-140 and signed the document, in Part 8, under penalty of perjury, he was certifying information which he knew to be untrue.

See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to

procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> (d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Under 8 C.F.R. § 204.5(g)(2), the petitioner bears the burden of proving its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. In this case, the petitioner has not demonstrated its existence at the time the instant petition was filed; its ongoing relationship with , and, therefore, its ability to pay the beneficiary the proffered wage.

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.

ORDER: The appeal is dismissed.