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

U.S. Citizenship and Immigration Services

[redacted]

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DATE: NOV 27 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Chinese style food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that it had extended a bona fide job offer to the beneficiary, as the beneficiary is the cousin of one of the petitioner's co-owners. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 2, 2009 decision, an issue in this case is whether or not the petitioner established that it extended a bona fide job offer to the beneficiary.

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.

In the instant case, the Form ETA 750 was accepted on April 16, 2004. The Form ETA 750 states that the position requires two years of experience in the job offered as a cook of Chinese style food. On the Form ETA 750, signed by the beneficiary on April 6, 2004, the beneficiary did not claim to have worked for the petitioner.

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.[1]

The director issued a request for evidence (RFE) on December 17, 2008 in which he asked the petitioner to provide a detailed explanation of the familial relationship between the beneficiary and the petitioner's co-owner. The director also asked for documentation from the DOL showing that it was aware of this relationship before it certified the labor certification. In response, the petitioner submitted an affidavit from Toi Hong Ho, stating that the beneficiary is his cousin. The petitioner additionally submitted an April 6, 2004 letter from the petitioner to the DOL. The AAO notes that

[1] 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).

this letter does not describe the familial relationship between the beneficiary and the petitioner's co-owner.

In the director's April 2, 2009 decision, he found that the DOL did not have an opportunity to conduct an inquiry as to whether the position offered to the petitioner's co-owner's family member was clearly open to qualified U.S. workers and into whether U.S. workers were rejected solely for lawful job-related reasons. The director concluded that, based on the evidence of record, it did not appear that the petitioner had extended a bona fide job offer to the beneficiary, which had been open to all qualified U.S. citizens.

On appeal, counsel for the petitioner contends that ETA Form 750 does not ask whether there is a preexisting family relationship between the petitioner and the beneficiary. Counsel explains that the petitioner's main cook was ill and that the petitioner recruited the beneficiary based on his cooking skills rather than based on his familial relationship to one of the co-owners of the business.

Counsel cites certain legal decisions in support of her argument. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner submits copies of newspaper ads it ran regarding the position and a signed letter dated May 8, 2009 from its co-owners, [redacted] and [redacted] The letter states that the decision to hire the beneficiary was strictly business related, as the petitioner has had difficulty finding Chinese food cooks in the United States. The letter explains that co-owner [redacted] is one of the cooks in the petitioner's kitchen and that he has had certain health issues, thus necessitating the use of the beneficiary's services. 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)).

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). The AAO finds that the petitioner failed to establish the legitimacy of the job offer it extended to the beneficiary as requested by the director.

Beyond the decision of the director,[2] even if the beneficiary's job offer were to be considered bona

[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D.

fide, the AAO finds that the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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'r 1986). *See also, Madany* 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 labor certification states that the offered position requires two years of experience in the job offered as a cook of Chinese style food. On the labor certification, the beneficiary claims to qualify for the offered position based on his prior experience, which includes working as an assistant cook for the [redacted] in China from February 1995 through December 1996, as a cook for the [redacted] in China from January 1997 through August 2000, and as a cook for the [redacted] in China since October 2000.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner submitted a letter dated March 15, 2004 from a manager with an illegible signature from the [redacted] regarding the hotel's employment of the beneficiary since October 2000. The AAO finds that the letter does not delineate the beneficiary's regular work hours or schedule (i.e., whether or not the beneficiary was engaged in full-time work). The AAO also finds that the letter fails to describe the beneficiary's duties there. Accordingly, the petitioner failed to demonstrate that the beneficiary possessed two full years of experience as a cook of Chinese style food before the April 16, 2004 priority date.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner failed to establish that the beneficiary is qualified for the offered position.

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.

Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

ORDER: The appeal is dismissed.