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

B6

[redacted]

DATE: OCT 0 1 2012 OFFICE: TEXAS 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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a catering business. It seeks to employ the beneficiary permanently in the United States as a continental specialty cook. 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 had failed to establish that the beneficiary is qualified for the proffered position. 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 24, 2009 decision, the single issue in this case is whether or not the petitioner has established that the beneficiary is qualified for the proffered position.

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 Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The priority date 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 November 12, 2003. Part A, Section 14 of the Form ETA 750 states that the position requires two years of experience in the job offered as a continental specialty cook. On the Form ETA 750, signed by the beneficiary on February 4, 2003, the beneficiary claimed to have worked for [redacted] as a continental specialty cook from 1996 through 1999.

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]

[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).

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)(l), (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 continental specialty cook. On the labor certification, the beneficiary claims to qualify for the offered position based on his prior experience, which includes working as a continental specialty cook for [redacted] in [redacted] from 1996 through 1999.

With the petition, the petitioner submitted affidavits from [redacted] and [redacted] two former co-workers of the beneficiary, attesting to the beneficiary's experience as a cook, continental specialty with [redacted] from 1996 to 1999. In his Request for Evidence (RFE) dated April 30, 2008, the director requested evidence that the beneficiary met the work experience requirements of the labor certification by the priority date. In response to the RFE, the petitioner submitted the same two affidavits from [redacted] and [redacted]

In the director's April 24, 2009 decision, he stated that these affidavits state that these individuals worked with the beneficiary at [redacted] from 1996 through 1999 and that the restaurant no longer exists. The director also noted that counsel drafted a letter that the petitioner submitted in response to the RFE, stating that [redacted] no longer exists and that the beneficiary is therefore unable to obtain a reference letter from this prior employer, as he does not know the owner's whereabouts.

The director found that the two affidavits appeared to have been written by the same individual using the same wording with only a few phrases deleted or changed. The director highlighted that the affidavits were from the beneficiary's former co-workers, not his employer. The director also noted that the petitioner had failed to evidence when [redacted] ceased to operate. The director concluded that the beneficiary did not meet the minimum requirements for the classification requested.

On appeal, the petitioner submits a new experience letter on behalf of the beneficiary. Counsel asserts that this letter confirms the beneficiary's completion of prior experience as a cook before he entered the United States. The translated letter from [redacted], dated May 7, 2009 states that the beneficiary worked as a cook of continental foods at the [redacted] in [redacted] from January 1986 through February 1988.

The AAO does not find this letter to constitute persuasive evidence of the beneficiary's prior employment, because the beneficiary failed to list this purported employment on the labor certification. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Further, the AAO finds that this employment letter fails to describe the beneficiary's duties or work hours.

The petitioner submitted no new evidence to support the beneficiary's claimed experience with [redacted] including Forms W-2, paystubs, or other regulatory-prescribed evidence. 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 has failed to establish that the beneficiary is qualified for the offered 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.