

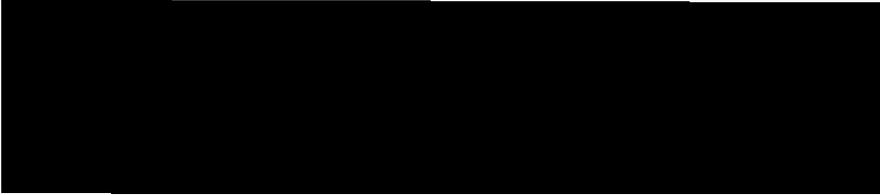
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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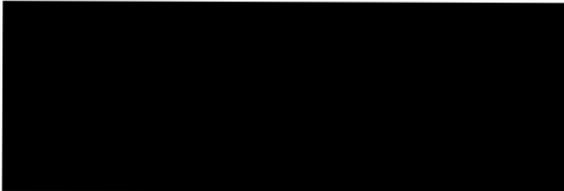
FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:  
SRC 06 136 50212

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:

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, Texas Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. 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 denial 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 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 9089, Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition.<sup>1</sup> *Matter of Wing's Tea House*, 16 I&N

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<sup>1</sup> To determine whether a beneficiary is eligible for a third preference immigrant visa, CIS must ascertain whether the alien is in fact qualified for the certified job. 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 *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).

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 September 26, 2005. The labor certification states that the position requires two years of "Experience in hotel front desk management and maintenance duties."

On the Form ETA 9089 the beneficiary, who signed that form on March 21, 2006, stated that he had worked for the petitioner (1) from June 1, 1996 to September 30, 1997 as a maintenance worker, (2) from October 1, 1997 to January 31, 1999 as a desk clerk, and (3) from February 1, 1999 until he signed that form as an assistant manager. The beneficiary further stated that in each of those positions he worked 40 hours per week.

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.<sup>2</sup>

In the instant case the record contains (1) the beneficiary's resumé, (2) a letter dated March 16, 2006, (3) the 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and (4) the joint 2005 Form 1040 U.S. Individual Income Tax Return of [REDACTED] and [REDACTED]. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

The March 16, 2006 letter is from the petitioner's president and reiterates the beneficiary's claim of qualifying employment as stated on the Form ETA 9089. That is; it states that the beneficiary worked in maintenance from June 1, 1996 to September 30, 1997, as a desk clerk from October 1, 1997 until January 31, 1999, and as its assistant manager since February 1, 1999.

The beneficiary's resumé, however, states that the beneficiary worked for the petitioner from "June 1996 – Present" as "Manager." The body of that resumé lists various services he has provided including "Desk clerk and Night Auditor," and "Handled maintenance work."

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

The beneficiary in this matter is [REDACTED]. The Form I-140 states that his social security number is 252-95-9230. The personal tax returns submitted are those of [REDACTED] and [REDACTED]. They state that the social security number of [REDACTED] as is that of [REDACTED]. This

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<sup>2</sup> 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 I&N Dec. 764 (BIA 1988).

office believes, therefore, that [REDACTED] and [REDACTED] are short forms of the name [REDACTED] and that the tax returns submitted are those of the beneficiary.

The beneficiary's 1996, 1997, 1998, 1999, 2000, 2001, and 2005 tax returns show Line 7 wage income of \$2,000, \$5,600, \$10,264, \$10,800, \$8,600, \$2,100, \$3,600, respectively. The 2002, 2003, and 2004 returns show no wage income.

Some of the tax returns are accompanied by Form W-2 Wage and Tax Statements and Form 1099 Miscellaneous Income statements.

The petitioner issued W-2 forms to the beneficiary indicating that it paid the beneficiary wages of \$2,000, \$5,600, \$10,263.51, \$10,800, and \$8,600 during 1996, 1997, 1998, 1999, and 2000. The 2005 return is accompanied by a W-2 form that shows that [REDACTED] Incorporated Raceway of Macon, Georgia paid the beneficiary \$3,600 in wages during that year.

The 2001, 2002, 2003, and 2004 returns are not accompanied by W-2 forms. Line 7 of those returns indicates that the beneficiary earned wages of \$2,100 during 2001 and had no wage income during 2002, 2003, and 2004. The employer who paid the beneficiary wage income during 2001 is unidentified.

The beneficiary's 2002, 2003, 2004, and 2005 returns were accompanied by Schedules C, Profit or Loss from Business, indicating that at least some of the beneficiary's income during those years was from self-employment. The returns show that the beneficiary had business income of \$7,000, \$7,545, \$8,015, and \$18,000 during 2002, 2003, 2004, and 2005. On the Schedules C the beneficiary listed his principal business or profession as motel administration during 2002, 2003, and 2004, and management consulting in 2005.

A Form 1099 Miscellaneous Income statement shows that [REDACTED] Incorporated paid \$18,000<sup>3</sup> to the beneficiary during 2005. The identity of the company or individual that provided the beneficiary his business income during 2002, 2003, and 2004 is unknown.

As stated on the beneficiary's tax returns, the total of the beneficiary's income, from both wages and self-employment, then, was \$2,000 during 1996, \$5,600 during 1997, \$10,264 during 1998, \$10,800 during 1999, \$8,600 during 2000, \$2,100 during 2001, \$7,000 during 2002, \$7,545 during 2003, \$8,015 during 2004, and \$21,600 during 2005. The amounts demonstrated to have been paid to the beneficiary by the petitioner, however, are \$2,000 during 1996, \$5,600 during 1997, \$10,263.51 during 1998, \$10,800 during 1999, and \$8,600 during 2000.

The director issued the decision from which this appeal was taken on June 14, 2006. The director noted that the beneficiary's tax returns state that his occupation during 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, and 2004 was desk clerk, and that his occupation during 2005 was motel management and questioned whether the beneficiary had, therefore, the requisite experience in maintenance. The director also noted that the

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<sup>3</sup> That company issued two Forms 1099 to the beneficiary during that year, one for \$7,500 and one for \$10,500. The reason for that division is unknown.

beneficiary's wages during the salient years were inconsistent with his claim of full-time employment during those years.

Further still, the director stated that the employment history stated on the beneficiary's resumé is inconsistent with the history suggested by his tax returns. The director found that the conflicting evidence does not reliably demonstrate that the beneficiary has the requisite experience and denied the visa petition.

On appeal, counsel asserted that the evidence submitted is consistent and demonstrates that the beneficiary has the requisite two years of experience in hotel front desk management and maintenance duties.

In a brief filed to supplement the appeal counsel noted that tax returns are not typically requested to verify employment experience. Counsel implied that Citizenship and Immigration Services (CIS) is not permitted to request additional evidence beyond that specifically required in the regulations and was not, therefore, justified in relying on the information in the tax returns.

As to the beneficiary's low wages, which the director found inconsistent with full-time employment, counsel stated that "an alternate (sic) compensation arrangement had been reached between Petitioner and [the beneficiary]<sup>4</sup>, due to the beneficiary's lack of work authorization." Counsel did not explain that assertion further and provided no evidence in support it, but stated that CIS "should be able to acknowledge that an "alternate (sic) compensation arrangement" was reached between Petitioner and Beneficiary," apparently on the strength of counsel's assertion, and that this would account for the low amount of reported income. Counsel stated that this alternative compensation arrangement also explains the misstatement on the beneficiary's tax returns that the beneficiary worked as a desk clerk, but did not explain that assertion further. Counsel also stated that the beneficiary's wages increased over time, which he states indicates increased responsibility.

As to the conflict between the beneficiary's resumé and his claim of qualifying employment, counsel stated that "Resumés, by their very nature, are supposed to be generic and emphasize the high points of a person's qualifications." Counsel stated, "if a more detailed summary was desired, [CIS] could have requested it."

As to the requirement of *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988) that, in cases where the credibility of the evidence is at issue, the beneficiary is required to submit independent objective evidence, counsel attempted to distinguish that case from the instant case. Counsel noted that in *Matter of Ho, Id.*, the petition was a family-based petition and involved an adoption. Counsel also noted that in such a case fraudulent documents may be suspected, and implied that this case is therefore manifestly different from the instant case.

This office sees no indication in *Matter of Ho* that the decision is limited to alien relative petitions or that employment-based petitions are excluded from its ambit. Further, this office sees no reason to distinguish between that case and the instant case as concerns the possibility of fraud.

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<sup>4</sup> Counsel incorrectly referred to the beneficiary as "Respondent" in that sentence. Counsel is reminded that the beneficiary has no standing in this matter. 8 C.F.R. § 103.3(a)(1)(iii). The beneficiary may not file an appeal in this matter 8 C.F.R. § 103.3(a)(1)(iii)(B), and is not the respondent.

In a request for evidence issued on April 27, 2006 the director asked, *inter alia*, that the petitioner submit “additional evidence of the beneficiary’s previous work experience such as W-2 forms, paystubs, payroll receipts, etc from 1996 to 2005.” The director’s request may have been prompted by the fact that the only employment verification letter in the record was provided by the petitioner itself.<sup>5</sup> The request for additional evidence pursuant to 8 C.F.R. § 103.2(b)(8) was perfectly proper. In response to that request, counsel provided the tax returns described above.

The director did not specifically require the beneficiary’s tax returns, although she could have, had she deemed a nexus to the benefit sought. The petitioner might have submitted any number of items but submitted the tax returns, and the director was certainly justified in considering that proffered evidence, notwithstanding that they were not specifically required by the governing regulations, nor by the director’s request for evidence.

Rather than clearing up the discrepancy, the beneficiary’s tax returns and the attached Forms W-2 and 1099 cast additional doubt on the veracity of the beneficiary’s claim of qualifying employment. This office notes that the tax returns, Forms W-2, and Forms 1099 were contemporaneously produced for a purpose unrelated to the instant visa petition, whereas the Form ETA 9089 and the petitioner’s owner’s letter were produced with the manifest intent of obtaining approval of the petition. This endows the contemporaneous evidence with a reliability that the documents prepared to support this visa petition lack, when they are weighed as evidence of the beneficiary’s qualifying employment.

Counsel’s response to the discrepancy is to assert that the contemporaneous evidence of the beneficiary’s employment history was falsified, and that the evidence produced specifically to gain approval is accurate. Counsel does not convince this office. However, the implication of counsel’s assertion, that the petitioner has previously prepared inaccurate documents for submission to the U.S. Federal government, either in furtherance of its own interests or those of the beneficiary, is not lost on this office.

Further, although counsel asserts that the wages shown on the tax returns provided were not the wages the petitioner actually paid to the beneficiary, he also asserts that the increase in those fictitious amounts shows that the beneficiary accrued additional responsibilities over time. Given that counsel has asserted that the figures on those returns are inaccurate this office does not find that changes in those figures are probative.

Counsel states that the low wages shown on the beneficiary’s tax returns are the result of an “alternate compensation agreement” that the petitioner and beneficiary reached because of the beneficiary’s lack of work authorization. This assertion relies on the assumption that it would have been legal for the petitioner to employ the beneficiary and to pay him low wages, but not to pay him wages commensurate with full-time work. Otherwise, the misrepresentation of the amount of wages paid to the beneficiary could not help him to escape the consequences of illegal employment. The record contains no indication, other than counsel’s statement, to support the assertion that the beneficiary’s low wages may have been a misstatement that resulted from an agreement reached because of his inability to work legally.

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<sup>5</sup> The director may also have noticed the apparent conflict between the beneficiary’s employment history as stated on his resumé, and that stated on the Form 9089 and in the petitioner’s owner’s March 6, 2006 letter. Those three items were in the record as then constituted.

The assertions of counsel are not evidence and thus 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); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. This office cannot “acknowledge” that an “alternate compensation agreement” existed based merely on counsel’s assertion.

Counsel seems, further, to assert that the beneficiary misrepresented that he worked as a desk clerk, rather than in some other position, because he did not have employment authorization. This argument is apparently premised on the assumption that the beneficiary could legally work as a desk clerk, but not in some other capacity. Otherwise misrepresenting his position would not help him to escape the consequences of illegal employment. As this does not appear to be the case, counsel’s argument is unconvincing.

As to the beneficiary’s resumé, this office is not concerned with a matter of emphasis, as counsel asserts, but with the specific statement that the beneficiary worked as the petitioner’s manager beginning during June 1996 and continuing at least until that resumé was submitted. As the resumé was submitted with the visa petition on March 27, 2006, it indicates that the beneficiary worked as the petitioner’s manager during all of the salient years through the September 26, 2005 priority date. No clearer or “more detailed” statement was needed.

Although the beneficiary claims to have worked for the petitioner since June 1, 1996, the record contains no evidence that the petitioner paid any wages or other compensation to the beneficiary during 2001, 2002, 2003, 2004, 2005, or any subsequent years. The record does not, therefore, support that the petitioner employed the beneficiary during those years.

Although the beneficiary claims to have worked full-time for the petitioner, the amounts the petitioner has demonstrated that it paid him, \$2,000 during 1996, \$5,600 during 1997, \$10,263.51 during 1998, \$10,800 during 1999 and \$8,600 during 2000, are inconsistent with full-time employment. The record does not support that the petitioner employed the beneficiary full-time during those years.

Further, the total that the petitioner has demonstrated that it paid to the beneficiary during all five of the salient years is \$37,263.51. That amount is insufficient to show that the beneficiary worked the equivalent of two years of full-time employment, even if the employment were demonstrated to be qualifying “Experience in hotel front desk management and maintenance duties.”

The record shows that during [REDACTED] Incorporated Raceway paid the beneficiary \$18,000. The beneficiary’s 2005 Schedule C, however, indicates that this amount was paid for his services in management consulting, rather than any qualifying hotel front desk management or maintenance duties.<sup>6</sup> That payment does not support the beneficiary’s claim of qualifying employment. Further, even if it had been a payment for qualifying employment, that amount is inconsistent with full-time employment.

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<sup>6</sup> Counsel acknowledged, in argument, that management experience, rather than front desk duty, is not the qualifying employment requisite to the proffered position.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience in hotel front desk management or maintenance duties. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The petition was correctly denied on this ground, which ground has not been overcome on appeal.

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.