

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

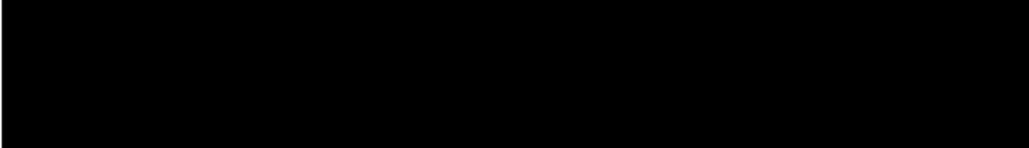


U.S. Citizenship  
and Immigration  
Services



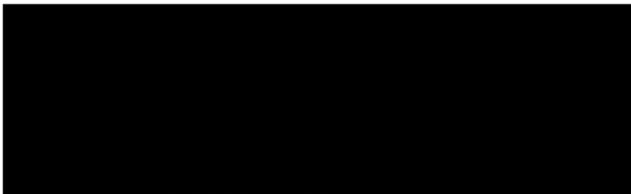
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DATE: **DEC 26 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: 

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:

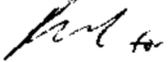


INSTRUCTIONS:

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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, on May 17, 2007. The petitioner filed a motion to reopen and a motion to reconsider on June 20, 2007. The director granted the motions and reaffirmed his prior decision denying the petition on July 24, 2009. The petitioner filed an appeal on August 27, 2009. On October 29, 2009, the director rejected the appeal as being untimely filed. The petitioner filed an appeal of this decision on December 1, 2009, which is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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).<sup>1</sup> In his October 29, 2009 decision, the director determined that the petitioner filed the August 27, 2009 appeal in an untimely manner and that the appeal failed to meet the requirements of a motion. The director rejected the appeal.

The record shows that the instant 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.

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 Alien 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 April 30, 2001. The labor certification states that the position requires two years of experience in the job offered as a cook or two years of experience in the related occupation of cook helper/assistant. On the Form ETA 750, signed by the beneficiary on February 5, 2006, the beneficiary did not claim to have worked for the petitioner.

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<sup>1</sup> This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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.<sup>2</sup>

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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the proffered position of cook or two years of experience in the related occupation of cook helper/assistant. On the labor certification, the beneficiary claims to qualify for the offered position based on his prior experience, which includes working as a cook since January 2001 for [REDACTED] working as a cook helper from May 2000 through November 2000 for [REDACTED] and working as kitchen help from an unlisted month in 1989 through April 1996 for [REDACTED] New Jersey.

In the director's July 24, 2009 decision, he stated that the petitioner submitted a letter from Red Lobster regarding the beneficiary's prior work experience there, but that the letter failed to demonstrate that the beneficiary possessed the requisite two years of experience as of the April 30, 2001 priority date.

The director noted that the petitioner submitted a letter from [REDACTED] Honduras accompanied by a certified English translation in response to the director's September 6, 2006 request for evidence (RFE). The director stated that the letter indicated that the beneficiary worked there as a cook helper from March 1981 through July 1983. However, the beneficiary failed to list this prior work experience 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.

The director noted that he issued a second RFE to the petitioner dated December 6, 2006, requesting

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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 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).

specific evidence corroborating the beneficiary's employment at [REDACTED]. The director found that the petitioner submitted an unsigned and undated foreign language document with an uncertified English translation, which was not in compliance with the terms of 8 C.F.R. § 103.2(b)(3):

*Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The director further found that the record of proceeding indicated that the beneficiary was residing in Catacamas, Honduras from 1981 through March 2000. However, the employment verification letter from [REDACTED] indicated that the beneficiary was working in Tegucigalpa, Honduras from March 1981 through July 1983. The director noted that these locations are 131 miles away from each other, 262 miles round trip. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The director noted that the petitioner submitted an affidavit from the beneficiary, stating that his permanent family address in Honduras was always in Catacamas, but that he worked at various jobs in multiple locations in Honduras. The director concluded that the petitioner failed to support the beneficiary's claims with supplementary evidence. 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)).

The director additionally found that the June 14, 2007 employment verification letter that the petitioner submitted from [REDACTED] on behalf of the beneficiary stated that he worked there as a cook assistant from December 1993 through December 1996, but that the beneficiary instead listed on the labor certification that he worked for [REDACTED] as kitchen help from 1989 through April 1996.

The director concluded that the petitioner failed to demonstrate that the beneficiary possessed the requisite experience for the proffered position as of the priority date.

On appeal, the petitioner submits a new employment verification letter from [REDACTED] dated August 13, 2009, stating that the beneficiary worked there as a cook assistant from October 1990 through July 1993 and then from December 1993 through December 1996. Counsel for the petitioner states that the human resources department for [REDACTED] inadvertently did not list all of the dates of the beneficiary's employment there in the first employment verification letter and that this

failure to list all of his dates of employment occurred because the beneficiary took a four-month break during his employment there. The AAO finds that this new employment verification letter still does not conform to the dates of the beneficiary's employment as listed on the labor certification, and the inconsistency remains unresolved. *See Matter of Ho*, 19 I&N Dec. at 591-592. On appeal, the petitioner fails to address the other deficiencies within the record of proceeding that the director highlighted within his decision.

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. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director,<sup>3</sup> the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>4</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner submitted a copy of its Internal Revenue Service (IRS) Form W-3 for 2004 as evidence that it employed more than 100 workers. However, the Employer Identification Number (EIN) listed on the Form W-3 was different than the unlisted EIN on the Form I-140 petition. Further, the petitioner did not provide a statement from its Chief Financial Officer (CFO), stating that the petitioner's business had the ability to pay the beneficiary the proffered salary. The petitioner instead submitted a letter dated May 18, 2006 from its general manager, [REDACTED], from its Harrisonburg, Virginia location, attesting to its ability to pay. The petitioner did not submit any annual

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<sup>3</sup> 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. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> 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).

<sup>4</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. filed Nov. 10, 2011).

reports, federal tax returns, or audited financial statements demonstrating its continuing ability to pay since the priority date.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Also beyond the decision of the director, it is concluded that the petition is not supported by a *bona fide* job offer. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). The new Form ETA 750 submitted with the Form I-140 reflecting the substitution of the instant beneficiary lists the work location as Harrisonburg, Virginia, whereas the location of the work location on the original Form ETA 750 was Alexandria, Virginia. The petitioner failed to provide any evidence that the DOL certified this change in work location. The labor certification is only valid for the specific job, employer, and location for which it was certified. 20 C.F.R. § 656.30(c). Harrisonburg, Virginia is outside of the Metro Statistical Area (MSA) of Alexandria, Virginia. Accordingly, this was not a valid test of the applicable labor market.

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.