

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]

B6

DATE: NOV 01 2012 OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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 Director, Texas Service Center, initially approved the employment-based immigrant visa petition. The director later revoked the approval of the petition. The petitioner appealed the revocation to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a Chinese restaurant. It seeks to permanently employ the beneficiary 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).<sup>1</sup> The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. 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. 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).

In this case, the labor certification was filed on November 12, 2002. The labor certification states that the position requires two years of experience in the job offered of Chinese specialty cook or two years of experience as an apprentice cook. The director approved the petition on July 6, 2006. The beneficiary submitted an immigrant visa application based on the approved petition with the U.S. Consulate in Guangzhou, China.

As summarized in the director's October 14, 2009 notice of intent to revoke the approval of the petition (NOIR), the consulate returned the petition to the director after its fraud prevention unit conducted a field investigation and interviewed the beneficiary. The investigation revealed that the beneficiary had not worked as a cook at a restaurant where he claimed to have worked for several years. The consulate concluded that the beneficiary was not qualified for the requested visa classification because he did not possess the required employment experience.

The petitioner's NOIR response included a letter dated January 21, 2002 from [REDACTED] in Fredericksburg, Virginia and the beneficiary's Forms W-2 from [REDACTED] for the years 1992, 1993, 1994, 1996 and 1997.

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<sup>1</sup> 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In the letter from [REDACTED] Manager [REDACTED] states that the beneficiary worked for the restaurant from March 1996 to August 1998 as a Chinese specialty cook and from October 1992 to January 1995 as an apprentice cook. The letter also states that the beneficiary worked 40 hours per week and was paid \$11.35 per hour.

On November 16, 2009 the director issued a notice of revocation (NOR) which revoked the approval of the petition. The director found that the petitioner did not submit additional evidence sufficient to overcome the grounds stated in the NOIR and, therefore, did not meet its burden of proof.

On appeal, counsel asserts that the director incorrectly revoked approval of the petition. Counsel states that the evidence submitted in response to the NOIR was mischaracterized by the director in the NOR. In particular, counsel correctly notes that the director states that the Forms W-2 submitted in response to the NOIR were from the petitioner, [REDACTED] t/a [REDACTED] [REDACTED], when they were actually issued by [REDACTED]. Counsel notes that the address and employer's identification number (EIN) on the Forms W-2 are not the same address and EIN as listed on the petition and income tax returns.

The director's confusion is likely due to the similarity between the petitioner's name [REDACTED] [REDACTED] and the former employer's name [REDACTED]. In addition, the petitioner's cover letter submitted in response to the NOIR also confuses the two entities, combining the two business names: in his November 10, 2009 letter, counsel states that he is submitting a letter from [REDACTED] as Exhibit 2 and "Copies of [the beneficiary's] IRS Form W-2 for 1992, 1993, 1994, 1996 and 1997 showing [REDACTED] as the employer (Exhibit 3)." (Emphasis added.).

Notwithstanding the director's mistake regarding the entity that issued the Forms W-2 submitted in response to the NOIR, the petitioner's NOIR response failed to address that the consulate, following an investigation and interview, determined that the beneficiary had not been employed by a restaurant where he claimed to have worked as a cook for several years.

Moreover, the evidence submitted by the petitioner in response to the NOIR does not support a conclusion that the beneficiary possessed the required two years of experience as a Chinese specialty cook or apprentice cook. The January 21, 2002 letter from [REDACTED] states that the beneficiary worked from March 1996 to August 1998 as a Chinese specialty cook and from October 1992 to January 1995 as an apprentice cook. The letter also states that the beneficiary worked 40 hours per week and was paid \$11.35 per hour. If the beneficiary actually worked 40 hours per week and was paid \$11.35 per hour, as stated in the letter from [REDACTED] his annual wages would be \$23,608. The beneficiary's Forms W-2 show that he earned the following amounts while working at [REDACTED]

<u>Year</u>	<u>Wages</u>
• 1992	\$1,800
• 1993	\$1,300
• 1994	\$4,179
• 1996	\$16,201
• 1997	\$21,888

None of the Forms W-2 show that the beneficiary earned \$23,608 or more. This contradicts the statement by the manager of [REDACTED] that the beneficiary “worked 40 hours per week and his monthly salary was \$11.35/hour.” Even if the manager was referring to the time period at the end of his tenure with [REDACTED] when stating that he worked 40 hours per week and earned \$11.35 per hour, it is clear from the Forms W-2 that the beneficiary did not work full time during the years 1992, 1993 and 1994. If the beneficiary was employed by [REDACTED] beginning in October 1992 and worked full time until January 1995, then his wages for the entire year of 1993 would be more than his wages for the three months he worked in 1992. However, the 1993 W-2 shows he earned less than he earned in 1992. Additionally, the beneficiary’s wages for the years 1992, 1993 and 1994 are less than the wages of a full time employee earning minimum wage.<sup>2</sup> It is incumbent upon 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).

Regarding the beneficiary’s employment as a Chinese specialty cook from March 1996 to August 1998, the beneficiary may have accrued one year of full time employment from March 1996 to March 1997, but he did not earn \$11.35 per hour as stated in the manager’s letter. A second year of employment would have accrued from March 1997 to March 1998, however there is not a 1998 Form W-2 in the record to support that the beneficiary actually worked for [REDACTED] in 1998. The AAO notes that the “August 1998” ending date for the beneficiary’s employment in the letter from [REDACTED] is written in different font than the rest of the letter and appears to have been added after a previous date was whited-out. This calls into question whether the beneficiary actually worked for [REDACTED] until August 1998. Again, doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In summary, based on the results of the U.S. consulate’s interview and investigation as well as the unresolved inconsistencies in the record relating to the beneficiary’s claimed qualifying employment, the AAO concurs with the director’s revocation of the petition’s approval.

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<sup>2</sup> On July 1, 1992 the minimum wage in Virginia was raised from \$3.65 per hour to \$4.25 per hour. See <http://www.bls.gov/opub/mlr/1993/01/art3full.pdf>. Therefore, full-time employee in Virginia earning the minimum wage would have earned \$8,840 in 2003.

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. The approval of the petition will remain revoked.

**ORDER:** The appeal is dismissed.