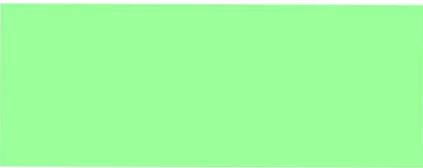


(b)(6)

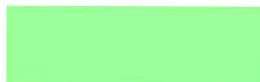
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

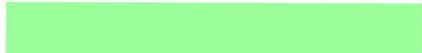
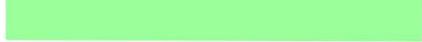


U.S. Citizenship  
and Immigration  
Services



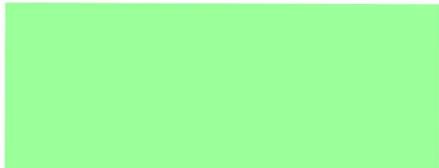
Date: **MAY 03 2013** Office: NEBRASKA SERVICE CENTER

FILE: 

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:**

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Rachel DiIorio*  
for  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on July 1, 2010. The AAO granted a subsequent motion to reopen and reconsider the matter and reaffirmed its prior dismissal of the appeal on November 1, 2011. The matter is again before the AAO on a motion to reopen and a motion to reconsider.<sup>1</sup> The motion will be granted and the previous decisions of the AAO will be affirmed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The AAO determined that the petitioner had failed to demonstrate that the petitioner had the continuing ability to pay the proffered wage to the beneficiary since the priority date. The AAO further determined that the record did contain sufficient credible evidence demonstrating the beneficiary had the required two years of experience in the offered job as listed on the ETA Form 9089. The AAO dismissed the appeal and affirmed the director's decision, and then subsequently reaffirmed its prior dismissal of the appeal on motion.

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.

In the current motion, counsel asserts that the results of the polygraph examination taken by the beneficiary regarding whether he had the required two years in the offered job should be considered as credible evidence in the current proceedings. Counsel states that a recently issued report from the American Polygraph Association Board of Directors entitled "Meta-Analytic Survey of Criterion Accuracy of Validated Polygraph Techniques" and dated September 9, 2011, provided validation for the procedures and techniques utilized in administering the beneficiary's polygraph examination. Counsel contends that the Supreme Court decision in *Daubert v. Merrill Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993) allows the use of polygraph examination results presented by an expert witness as a tool for the fact finder in an administrative setting under certain circumstances. Counsel submits a copy of the previously mentioned report as well as an outline entitled "[REDACTED]" from "[REDACTED]" the certified polygraphist who conducted the beneficiary's polygraph examination in support of the motion.

Counsel indicates that a brief and/or evidence in support of the motion will be forthcoming within thirty days of the receipt of the motion. Although additional material was subsequently submitted by

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<sup>1</sup> A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The content of counsel's motion does satisfy the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) only as it relates to the issue of whether the beneficiary had the required two years of experience in the offered job as listed on the ETA Form 9089. As counsel's motion fails to raise the issue of whether the petitioner established the continuing ability to pay the proffered wage since the priority date, the content of counsel's motion does not satisfy the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2), and this specific issue will not be addressed in this decision.

counsel, this documentation could not have been considered in the context of a motion. Evidence and briefs must be submitted with the motion. Unlike appeals, the regulation pertaining to motions to reopen or reconsider does not permit briefs and/or evidence to be filed subsequently. *See* 8 C.F.R. §§ 103.5(a)(2) and 103.5(a)(3).

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 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 and on motion.<sup>2</sup>

The issue to be considered on motion is whether the petitioner has established that the beneficiary meets the qualifications set forth on the ETA Form 9089.

The record reflects that a separate Form I-140, Immigrant Petition for Alien Worker, and corresponding Form ETA 750, Application for Alien Employment Certification, had previously been filed on the beneficiary's behalf by a different petitioner. In the instant case, the DOL accepted the current petitioner's ETA Form 9089 on April 30, 2001, the date on which the previously filed Form ETA 750 had originally been accepted. The ETA Form 9089 states that the position requires two years of experience in the job offered. On the ETA Form 9089, signed by the beneficiary on May 12, 2006, the beneficiary claims to have worked for the petitioner since November 1, 2005.

The beneficiary claimed that he had been employed as an Indian cook by [REDACTED] in Nohar, Rajistan, India, from January 1985 to December 1989 and as a catering cook for [REDACTED] in Sirsa, Haryana, India from January 1990 to July 1999 on the previously filed Form ETA 750 contained in the record. While the beneficiary reiterated his claim of employment as an Indian cook for [REDACTED] from January 1985 to December 1989 at part K of the ETA Form 9089, the beneficiary failed to claim any employment with [REDACTED] from January 1990 to July 1999. The record is absent any explanation for this discrepancy. The fact that the applicant has provided conflicting testimony relating to his employment history raises serious question regarding the credibility of such testimony. It is incumbent on 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).

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<sup>2</sup> The submission of additional evidence on appeal or on motion 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 of the documents newly submitted on appeal or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner submitted employment affidavits in an effort to substantiate the beneficiary's claimed qualifications. To meet the qualifications however, the employment affidavits must include the following: the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). In addition, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). According to the labor certification, the position requires two years of experience as an Indian specialty cook.

The record contains three affidavits, the first of which is dated September 1, 1999 and the remaining two both dated July 14, 2009, respectively, all of which are signed by [REDACTED] and relate to the beneficiary's employment as a head chef at [REDACTED] in Nohar, Rajasthan, India, from January 1985 to December 1989. However, the dates of the beneficiary's employment in the affidavit dated September 1, 1999, appear to have been altered in that the "5" in 1985 and the "9" in 1989 appear to have been inserted after the affidavit was executed. Furthermore, although [REDACTED] indicated that the beneficiary was employed by [REDACTED] for just under four years in each of the affidavits, he failed to provide a specific description of the beneficiary's duties.

The record also contains an affidavit dated July 10, 2009 that is signed by [REDACTED] stated that was the owner and chef of the [REDACTED] in Jalandhar City, India and that he employed the beneficiary as a chef from June 1, 1990 through March 30, 1998. However, [REDACTED] testimony contradicted the beneficiary's claim on the Form ETA 750 that he was employed by [REDACTED] in Sirsa, Haryana, India, as a cook from January 1990 through July 1999. In addition, as previously discussed, the beneficiary did not claim any employment with the [REDACTED] on the ETA Form 9089. It is incumbent on 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. 591-592. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The record further contains a letter dated February 18, 2010 signed by certified polygraphist [REDACTED] regarding the beneficiary's polygraph examination. [REDACTED] noted that a Washington state court certified interpreter was used for the examination and that prior to the examination [REDACTED] reviewed all relevant and comparison questions with the beneficiary to insure a common meaning. [REDACTED] states that in his opinion the beneficiary was not attempting deception when he responded affirmatively to the following questions:

- Did you work as a head chef at [REDACTED] from January 1985 to December 1989?
- Did you work as executive chef at [REDACTED] from June 1990 to March 1998?

Counsel's contention on motion that the Supreme Court decision in *Daubert*, allows the use of polygraph examination results presented by an expert witness as a tool for the fact finder in an

administrative setting under certain circumstances is correct. Although the Supreme Court and various circuit courts have noted that polygraph examination may be a useful tool to fact finders in some circumstances, none of these courts have issued a decision requiring that the results of polygraph examinations be accepted. In federal court proceedings, evidence of the results of a polygraph test is inadmissible and may not be "introduced into evidence to establish the truth of the statements made during the examination." *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988); *see also United States v. Frogge*, 476 F.2d 969 (5th Cir. 1973), *cert. denied*, 414 U.S. 849 (1974). Furthermore, the value of the polygraph is questionable for the same reasons that have led the federal courts to find them inadmissible. As previously mentioned, the results of a polygraph test may not be used to establish the veracity of the assertion tested. In establishing this rule, the courts have determined that "the polygraph has not yet been accepted . . . as a scientifically reliable method of ascertaining truth or deception." *United States v. Gloria*, 494 F.2d 477 (5th Cir. 1974). In immigration proceedings, however, documentary evidence need not comport with the strict judicial rules of evidence. Instead, as in deportation proceedings, "such evidence need only be probative and its use fundamentally fair, so as not to deprive an alien of due process of law." *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986); *see also Matter of D*, 20 I&N Dec. 827, 831 (BIA 1994).

On motion, counsel submits an outline entitled [REDACTED] from [REDACTED] the certified polygraphist who conducted the beneficiary's polygraph examination. The outline states the following in pertinent part:

2. Question Formulation:

- a. A total of four (4) relevant questions in a ten (10) question series.
- b. Questions should be short and direct.
- c. Questions should be understandable to client based on his education and social level.
- d. Client should not have prior knowledge of the test questions (no time to practice or rationalize question meaning).

Continued in pertinent part:

5. Type of information forwarded to requestor:

- a. Examiner's report.
- b. Computer generated test results.
- c. Charts generated during the examination.
- d. From a client standpoint, complete transparency of test procedure.

And again in pertinent part:

8. Problems associated with polygraph use:

- a. Clients fear of authority.

- b. Clients general mistrust of process and interpreters.
- c. Language and cultural differences.

As noted above, [REDACTED] acknowledged he used a Washington state court certified interpreter to conduct the beneficiary's polygraph examination and that he reviewed all relevant and comparison questions with the beneficiary to insure a common meaning in his letter dated February 18, 2010. The cited portions of [REDACTED] outline serve to confirm that the methodology he employed in conducting the beneficiary's polygraph examination may have been questionable because a translator was used to conduct the examination and the beneficiary was made aware of the questions to be asked in the examination prior to administration of the examination. In addition, Mr. Matzke's opinion regarding the veracity of the two answers provided by the beneficiary during the polygraph examination regarding his employment history is only supported by his examiner's report as the record is absent the results of the entire polygraph examination. Finally, Mr. Matzke failed to provide any explanation as to how he was able to conclude that the beneficiary was being truthful in light of the fact he failed to follow the standards put forth in the cited portions of his outline for conducting a polygraph examination and documenting the results.

The petitioner provides a report from the American Polygraph Association Board of Directors entitled "Meta-Analytic Survey of Criterion Accuracy of Validated Polygraph Techniques" and dated September 9, 2011. This report is a highly detailed scientific analysis of the accuracy rates of nine different types of validated Psychophysiological Detection of Deception (PDD) examination techniques, and its relevance in the instant case is minimal as counsel fails to make any connection between the report and the results of the beneficiary's polygraph examination.

As noted above, the record contains inconsistencies surrounding the beneficiary's work experience. The employment affidavits, the ETA Form 9089, and the Form ETA 750, contain inconsistent attestations regarding the beneficiary's employment history. Furthermore, the record is devoid of evidence establishing the duties performed by the beneficiary for Punjabi Dhaba from 1985 to 1989 or clarifying why, exactly, the various documents differ on where the beneficiary worked from 1990 to 1998, Pardesi Sweet Shop or Jagir Singh and Sons. Accordingly, it has not been credibly established that the beneficiary has the requisite two years of experience in the offered job. 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

The motion will be dismissed for the reason stated above. 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 motion is granted, and the dismissal of the appeal is affirmed.