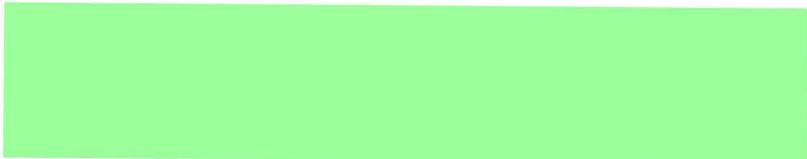


(b)(6)

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

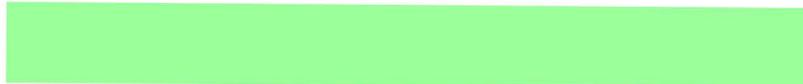


DATE: **MAY 31 2013**

OFFICE: TEXAS SERVICE CENTER

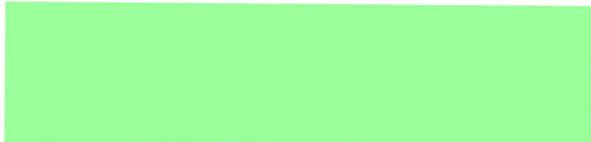
FILE: 

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 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,

*Rachel Nitonio*  
RN

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director) denied the petition and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is again before the AAO as a motion to reopen and a motion to reconsider. The motion to reopen will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner indicates that it is a tortilla factory. It seeks to employ the beneficiary permanently in the United States as a supervisor of Mexican food cooks. The director determined that the petitioner had not established that it had a continuing ability to pay the proffered wage or that the beneficiary was qualified for the offered position. On appeal, the AAO found that the record demonstrated the petitioner's ability to pay the proffered wage, but not the beneficiary's qualifications for the offered position.

On motion, counsel for the petitioner submits a translated letter from a Roberto Sanchez Hernandez regarding the beneficiary's employment experience.

The requirements for a motion to reopen and a motion to reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

(2) *Requirements for motion to reopen.* 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 . . . .

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record reflects that the motion to reopen and the motion to reconsider are properly filed and timely. Although the petitioner has not met the requirements for a motion to reconsider, it has satisfied those for a motion to reopen, submitting new facts with supporting documentation not previously considered. Therefore, the motion is granted and the AAO will reopen the matter.

The only issue before the AAO is whether the beneficiary is qualified to perform the offered employment.

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). Section 203(b)(3)(A)(i) of the Act 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.

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The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The priority date of the petition, the date on which it was accepted for processing by DOL, is April 30, 2001. See 8 C.F.R. § 204.5(d).

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. See *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 has the following minimum requirements:

EDUCATION

Grade School: None Required.

High School: None Required.

College: None required.

College Degree Required: Not Applicable.

Major Field of Study: Not Applicable.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the related occupation of Mexican Food Cook.

OTHER SPECIAL REQUIREMENTS: None.

The labor certification states that the beneficiary qualifies for the offered position based on his employment as a Mexican food cook with [REDACTED] Guantanamo, Mexico from April 1992 until January 1995. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

On appeal, the AAO found that, as the record did not contain a letter from [REDACTED] supporting the beneficiary's claim of having worked as a Mexican food cook from April 1992 until January 1995, the petitioner had failed to overcome the basis of the director's denial. Moreover, the AAO also noted that the beneficiary's claim of employment with [REDACTED] during the period

1992 to 1995 conflicted with the information he had provided in the Form I-485, Application to Register Permanent Residence or Adjust Status and the Form G-235A, Biographic Information, found in the record. In Part A of the Form I-485, the beneficiary had indicated that his last entry to the United States occurred in 1989 and in listing his residence in the United States on the Form G-325A, he stated that he had lived at a Santa Ana, California address from 1989 until March 25, 2008, the date on which he signed the G-325A. Noting that the record contained no independent, objective evidence that resolved this inconsistency, the AAO dismissed the appeal on this basis as well. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On motion, counsel asserts that the dates of the beneficiary's employment with [REDACTED] are the result of a clerical error. To establish the correct dates of that employment, he provides a translation of a May 1, 2008 statement from [REDACTED] in which [REDACTED] indicates that the beneficiary worked for "us" for "3 years or so [from] April 1986 until January 1989." [REDACTED] states that the beneficiary worked as a kitchen manager and an expert on traditional dishes of the region, such as peppers stuffed with rice, mixed dishes (steak, ranchera, pastor) and also developed his expertise in roast dishes and supervised the making of tortillas.

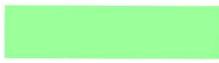
The AAO notes the statement from [REDACTED] but does not find it to resolve the identified inconsistency between the employment history claimed by the beneficiary on the Form ETA 750 and the dates of his residence in the United States, as reflected on the Form I-485 and Form G-325A.

[REDACTED] statement is written on the letterhead of what appears to be a restaurant named [REDACTED] the restaurant identified in the Form ETA 750, and he does not specifically state the name of the restaurant that previously employed the beneficiary. His statement also fails to identify his title or position with [REDACTED] or to indicate that the beneficiary was employed on a full-time basis, as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). Moreover, [REDACTED] statement is not supported by any documentary evidence of the beneficiary's employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. *See Matter of Ho*, 19 I&N Dec. at 591-592. Accordingly, the new evidence submitted on motion does not establish that the beneficiary had two years of experience as a Mexican food cook as of the April 30, 2011 priority date and is, therefore, qualified to perform the duties of the offered position.

The petitioner has failed to establish that the beneficiary is qualified for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act. Accordingly, the AAO will affirm its prior decision.

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.

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**ORDER:** The motion to reopen is granted and the decision of the AAO dated November 28, 2012 is affirmed. The petition remains denied.