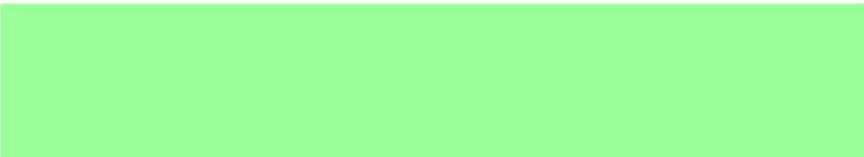




U.S. Citizenship  
and Immigration  
Services

(b)(6)

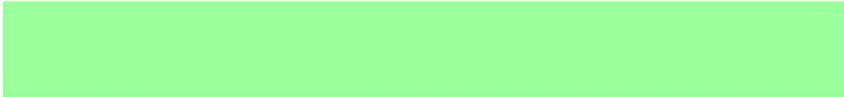


DATE: **SEP 13 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

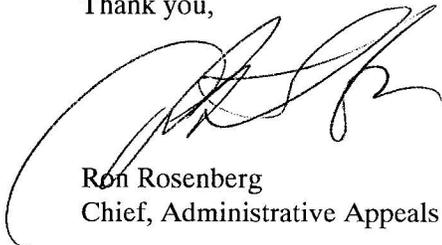


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Food Service Manager. 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 director determined that the petitioner had not established that the beneficiary possessed the required employment experience in the job offered as of the priority date. The director denied the petition accordingly.

It is noted that only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). See 8 C.F.R. § 204.5(c).

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record shows that the 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 regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The *bona fides* of the job offer must be established, which include a review of the beneficiary's qualifications and the petitioner's ability to pay the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2).<sup>1</sup> The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the ETA Form 9089 is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on February 27, 2008, which establishes the priority date.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on August 5, 2008, indicates that the petitioner was established in 2001 and employs 25 workers.

Part H of the ETA Form 9089 describes the duties, education, experience and training for the position of food service manager. The duties of the position are set forth at H.11, which states:

Plan, direct, or coordinate activities of an organization that serves food and beverages.

Part H of the ETA Form 9089 indicates that no formal education or training is required for the position, but that it requires 24 months of experience in the job offered and that no alternate occupation is acceptable for the required experience.

### **Beneficiary's Experience in the Job Offered**

The director indicated that the petition was filed without all of the required initial evidence and failed to demonstrate eligibility for the benefit requested. The director noted that the petitioner submitted no evidence that the beneficiary possessed the requisite 24 months of experience as of the priority date of February 27, 2008.

On appeal, the petitioner claims that an employment verification letter had already been submitted. The petitioner also states that proof of the company's ability to pay the proffered wage had been submitted. With the appeal, the petitioner provides a copy of a 2007 and 2008 Wage and Tax Statement (W-2) issued to the beneficiary by the petitioner. The petitioner also provides a letter

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<sup>1</sup> In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

stating that it had employed the beneficiary since 2007 [exact month of start unstated] and describing her duties.

On June 18, 2013, the AAO issued a Notice of Intent to Deny and Notice of Derogatory Information (Notice) relevant to the beneficiary’s prior attorney, the beneficiary’s experience and the petitioner’s ability to pay the proffered wage of \$41,808 per year. After informing the petitioner of derogatory information related to the petitioner’s prior attorney, relevant to the beneficiary’s experience, the AAO observed:

- a. If the petitioner elects to respond this NOID, please note that the beneficiary’s qualifying 24 months of work experience in the job offered has not been established as of the February 27, 2008, priority date. It is noted that the beneficiary, who signed the ETA Form 9089 under penalty of perjury on May 28, 2008, listed only one previous job. It was stated as “self employed” as a food service manager from January 2, 2004 to December 31, 2006. The address of the employment is given as [redacted], Georgia with no street address. This does not verify any qualifying experience in the job offered. It is noted that no employment experience verification letter was submitted with the initial filing, despite claims of the petitioner. Further, the petitioner’s letter submitted on appeal, claiming employment of the beneficiary as of 2007 as a “front of the house, back of the house” and office manager” even if such experience could be used (see footnotes 4 & 5 below), would not establish 24 months of experience in the job offered as of the February 27, 2008, priority date.<sup>2</sup> Further, the petitioner answered “no” to the question J.21 of the ETA Form 9089 in which it is asked if “the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?”<sup>3</sup> Her position

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<sup>2</sup> See *Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.) The beneficiary did not list any experience with the petitioner on the ETA Form 9089.

<sup>3</sup> 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....  
(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

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(ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position

described in the letter on appeal, appears to have been substantially comparable. If the petitioner elects to submit any additional evidence relevant to the beneficiary's experience, it is noted that any documentation verifying job experience must include original documentation complying with 8 C.F.R. § 204.5(1)(3),<sup>4</sup> including detailed evidence describing the beneficiary's duties, hours worked, and evidence of wages paid to her as would be kept by a certified government source which would corroborate her employment. Any evidence and/or statements submitted [redacted] or [redacted] must include five exemplars of his/her signature, must be notarized, and must be accompanied by photo identification. If the petitioner elects to respond, sufficient clarification and evidence sufficient to overcome the discrepancies noted above in the qualifying experience must be submitted. 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. See *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

In response to the AAO's Notice, the petitioner has submitted additional letters in support of the beneficiary's required 24 months of experience in the job offered. In addition to the submission of a copy of the April 29, 2009 letter from [redacted] the petitioner's president, which was discussed above (claiming the beneficiary's employment with the petitioner since 2007), the petitioner

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descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

<sup>3</sup> A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

...  
(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

<sup>4</sup> This regulation provides in pertinent part:

(ii) *Other documentation*—

(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.

provided two additional letters, both dated July 24, 2013, from [REDACTED]. The first letter states that he pays [REDACTED] to train the beneficiary for the general manager position. The letter does not state any dates. [REDACTED] then lists the skills that [REDACTED] was in charge of training. An accompanying letter from [REDACTED], dated July 24, 2013, similarly without dates for training, lists the skills that he trained the beneficiary in and describes the process to train the beneficiary to become a leader, not just a manager. The skills include managing inventory, supervising, scheduling, monitoring customer satisfaction, etc. Another letter, dated July 24, 2013 from [REDACTED] states that paid [REDACTED] to train the beneficiary to monitor recipe consistency and sanitation issues, but also fails to state any dates of the asserted training. An accompanying letter from [REDACTED] the chef, describes his training task the same way.

It is noted that the ETA Form 9089 does not require training in the job offered, but employment experience. Further, besides lacking any dates defining the parameters of this training, the letters reiterate the content of [REDACTED] April 29, 2009, letter referenced above. As noted in the AAO's Notice, the offered position's duties are broadly described in the labor certification and are expansive enough to include the duties described by the [REDACTED] letters. As they are substantially comparable to the duties of the offered position, such experience claimed with the employer cannot be used as the experience required by the ETA Form 9089 and as set forth in 20 C.F.R. § 656.17(h)(4)(i)(3)(i).

It is also noted that an additional letter, dated July 31, 2013, authored by [REDACTED] [REDACTED] has been submitted, which states that the beneficiary has been the operational contact for its vendor relationship with the petitioner's restaurants. Similarly, the letter fails to state the applicable dates of any duties as the "operational contact." The petitioner also submitted three certificates recognizing the beneficiary's certification related to food sanitation practices. The AAO does not accept these materials as directly relevant to the beneficiary's required 24 months of experience in the job offered as required by the ETA Form 9089, as they do not document the required experience. Further, two of the three certificates were issued after the priority date. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the foregoing, the petitioner failed to establish that the beneficiary possessed the requisite work experience in the job offered as of the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.