(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 30 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On August 28, 2012 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center. The petitioner has now filed a motion to reopen the AAO's decision to affirm the denial of the petition. The motion will be granted, the appeal reopened and re-adjudicated. Upon review, the appeal will be dismissed, and the AAO's previous decision will remain undisturbed. The petition will remain denied.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a chef, Thai cuisine. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, electronically certified by the United States Department of Labor (DOL). The AAO dismissed the appeal and denied the petition, finding that the petitioner failed to demonstrate by a preponderance of the evidence that the beneficiary possessed the requisite minimum work experience in the job offered prior to the priority date.

On motion to reopen, counsel for the petitioner maintains that the beneficiary possessed the minimum work experience in the job offered prior to the priority date. Counsel submits additional evidence to demonstrate that the beneficiary qualifies to be categorized as a skilled worker (requiring at least two years training or experience). The record shows that the motion to reopen is properly filed, timely and states specific reasons for re-adjudication. The motion is granted; and the appeal will be re-adjudicated.

The AAO conducts this 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 in this proceeding.[1]

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.

To be eligible for approval, the petitioner must demonstrate that the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the priority date is December 13, 2006, which is the date the ETA Form 9089 labor certification was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d). The occupational title or the position for which the petitioner seeks to hire the beneficiary is chef, Thai cuisine. The job duties described under section H.11 of the ETA Form 9089 are as follows:

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[1] 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).

> Assist in the preparation and cooking of various authentic Thai dishes including Pad Thai, Panang Curry, Pad See-Eu, meat, fish, and rice dishes. Assist in menu plans. Operate all necessary kitchen equipment.

Section H.2 of the ETA Form 9089 indicates that the position requires a minimum of 24 months (two years) of work experience in the job offered. No other training or alternate work experience and combination of education and experience are required for this position.

On the ETA Form 9089, section K, the petitioner stated that the beneficiary worked as a "su-chef" [sic] at in Bangkok, Thailand, from July 1, 1995 to September 15, 1997. To demonstrate that the beneficiary had the requisite work experience in the job offered for at least two years, the petitioner initially submitted a letter of employment certification signed by on February 16, 1995, stating that the beneficiary had been working with as a su-chef [sic] for 26 months (or approximately since January 1993).

In adjudicating the earlier appeal, the AAO noted that the letter of employment verification dated February 16, 1995 from lacked the specific description of the duties performed or the training received by the beneficiary, as required by the regulations at 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A). The AAO also noted that the beneficiary was working as a sous-chef at not chef. The AAO sent the petitioner a Request for Evidence (RFE) on May 15, 2012, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of experience as a chef before the priority date of December 13, 2006.

In response to the AAO's RFE, the petitioner submitted a second letter of employment certification from indicating that the beneficiary was a chef, Thai cuisine from February 1, 1996 to December 30, 1998, and that she performed all of the duties and responsibilities associated with that position including "supervision of all staff of chef helpers and prep employees." The letter was signed by general manager of on May 19, 2012.

Upon review, the AAO determined that the beneficiary did not have the requisite work experience in the job offered, because of the inconsistencies in the dates of the beneficiary's prior employment period and in the beneficiary's title or position at The AAO noted that the period of the beneficiary's employment on the ETA Form 9089 was from July 1, 1995 to September 15, 1997; whereas according to the February 16, 1995 letter from the beneficiary had commenced her employment as a sous-chef approximately since January 1993; while the May 19, 2012 letter indicated that the beneficiary worked from February 1, 1996 to December 30, 1998. The AAO also noted that the beneficiary's title or position, as listed on the ETA Form 9089 and stated by was sous-chef; whereas the author of the second letter of employment, stated that the beneficiary was a chef.

The AAO specifically stated that 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 will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On motion, counsel contends that the inconsistencies in the title/position of the beneficiary and in the dates of the beneficiary's employment period are minor inconsistencies and slight overlap, respectively. Counsel also indicates that regardless what the beneficiary's title/position was called (whether sous-chef or chef), the beneficiary had two years of work experience in *the duties* specified on the ETA Form 9089. According to counsel, before filing the ETA Form 9089, the petitioner specifically required all job applicants including the beneficiary, to have at least two years of work experience in the job duties described above, and not two years as a chef. As evidence, counsel submits a copy of the application filed by the petitioner with the State of Connecticut Labor Department to determine the prevailing wage for the position offered in this case.

To show that the beneficiary had the work experience in the duties as described in the ETA Form 9089 before the priority date and to resolve the inconsistencies in the beneficiary's title/position and dates of employment period, the petitioner submits a third letter of employment certification from , indicating that the beneficiary initially started to work as a kitchen helper and dishwasher in January 1993, before she became a full chef sometime in July 1995. This letter is dated September 8, 2012. In addition, the author of the letter, indicated that the former manager – the one who wrote the letter of employment certification on February 16, 1995 – referred to the beneficiary as a su-chef [sic].

Upon review of the evidence submitted, we are not persuaded that the beneficiary had the requisite work experience in the job offered before the priority date. The AAO has stated earlier that that any inconsistencies in the record must be resolved by independent, objective evidence. *See Matter of Ho,* 19 I&N Dec. at 591-92. In this case, no independent objective evidence, such as paystubs, payroll records, the beneficiary's government-issued identification, or other relevant proofs, has been submitted to show that the beneficiary had the experience in the job offered. 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)).

On motion, the owner of the petitioner also submits a letter dated September 6, 2012 addressed to USCIS Texas Service Center, in which he states that he cannot produce any other evidence to show that the beneficiary worked at due to the passage of time. Specifically, he indicates that he would no longer have any records of employment for his employees from 1993, if he were the one who is required to produce independent objective evidence.

The AAO notes that USCIS regulations at 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) allow USCIS to accept secondary proof in the event that the primary evidence is not available. The regulations further state, "If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner

must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." 8 C.F.R. § 103.2(b)(2)(i).

Here, the petitioner fails to submit any evidence – primary or secondary – showing the unavailability of the required or relevant documents to show that the beneficiary had the requisite work experience in the job offered. For this reason, we cannot accept the petitioner's claim that no other evidence is available simply due to the passage of time.

Further, the AAO disagrees with counsel that the inconsistencies in the title/position and the dates of the employment period of the beneficiary are minor inconsistencies and slight overlap. Sous-chef and chef are two different jobs. Additionally, the AAO observes that in her May 19, 2012 letter initially claimed that the beneficiary worked as a chef from February 1, 1996 to December 30, 1998; but later she revised her claim in her September 8, 2012 letter and stated that the beneficiary initially was hired as a dishwasher in January 1993, and that sometime in July 1995, the beneficiary had gained sufficient experience to assume duties and responsibilities of a chef. Yet, the letter from indicated that the beneficiary had been working as a sous-chef for 26 months, or approximately since January 1993. These are not "slight overlap," as alleged by counsel. In other words, whether the beneficiary worked as a sous-chef from July 1995 to September 1997 (as it was initially claimed in the ETA Form 9089), or as a chef from February 1996 to December 1998 (as later claimed in her letters) goes to the heart of the matter, and is material.

As noted above, the position offered is for a skilled worker, requiring at least two years of specialized training or experience. We do not find that the beneficiary had two years of specialized training or experience in the job offered before the priority date. 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. For the reasons stated above, the appeal must be dismissed.

ORDER: The motion to reopen is granted; upon review, the appeal is dismissed.