

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



File: [Redacted]
SRC-04-227-52178

Office: TEXAS SERVICE CENTER Date:

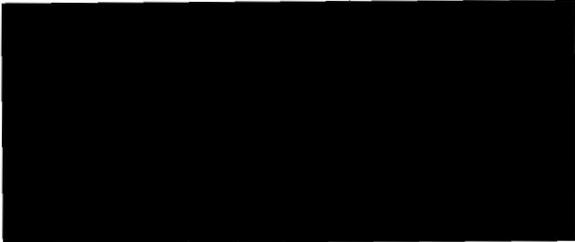
SEP 29 2008

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the Service Center in accordance with below.

The petitioner is a Japanese restaurant that seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign (“Specialty Cook, Japanese Cuisine”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s May 18, 2005, denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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 petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability

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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 19, 2001. The proffered wage as stated on Form ETA 750 for the position of a specialty cook is \$12.22 per hour, 40 hours per week, which is equivalent to \$25,417.60 per year. The labor certification was approved on August 5, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on August 23, 2004. Counsel listed the following information on the I-140 Petition related the petitioning entity: established: October 20, 2000; gross annual income: \$126,404; net annual income: \$2,801; and current number of employees: 3; salary: \$488.80 per week.

On April 1, 2005, the Service Center issued a Notice of Intent to Deny ("NOID") based on the petitioner's failure to demonstrate its ability to pay the beneficiary the proffered wage. The Service Center requested copies of the petitioner's federal tax returns for the years 2001, 2002, and 2003, as well as evidence that regarding the affiliation between [REDACTED] that the petitioner submitted bank account statements for, and the petitioner, [REDACTED]. The director determined that the evidence submitted in response to the NOID was insufficient, and denied the case on May 18, 2005. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. On Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary listed that he was employed with the petitioner since November 2000.

The petitioner provided the following W-2 Forms as evidence:

<u>Year</u>	<u>Amount</u>
2004	\$12,480
2003	\$12,480
2002	\$7,800 ²

The W-2 Forms along, however, are insufficient alone to establish the petitioner's ability to pay the proffered wage of \$25,417.60 per year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net

² The petitioner did not submit a W-2 Form for the beneficiary for the years 2000 or 2001.

income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay from the priority date. The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Line 21 indicates ordinary income as follows:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	\$2,801
2002	\$4,053
2001	\$4,311

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years, even if the wages paid to the beneficiary were added to the petitioner's net income.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2003	\$25,899
2002	\$24,692
2001	\$21,570

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner would have the ability to pay the proffered wage in the year 2003, but would lack the ability to pay the required wage in 2002 (where the petitioner's net current assets are only \$1,000 below the proffered wage), and in 2001. If the wages paid to the beneficiary were added to the net current assets, this would result in a combined total of \$37,172 in 2002, sufficient to demonstrate the ability to pay the proffered wage in that year as well. The petitioner cannot, however, demonstrate its ability to pay the proffered wage in 2001, where the net current assets are short in the amount of \$3,847 required to pay the proffered wage.

Counsel contends on appeal that the AAO should consider the petitioner's ability to pay based on bank statements forwarded. The petitioner submitted monthly business checking statements from March 31, 2001 to March 31, 2005. The bank statements reflect a high balance of \$13,454 at the end of November 2002 and a low balance of \$4,834 at the end of August 2003. In the year 2001, the petitioner maintained a balance of

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

over \$9,000 in eight months. In 2002, the petitioner maintained a balance of over \$7,000 in each month of the year; in 2003, with the exception of August's balance, the petitioner maintained a balance of over \$6,000 in each month; in 2004, the petitioner maintained a balance of over \$5,000 in each month, with the balance above \$7,000 in four months, above \$8,000 in three months, and above \$9,000 in one month.

Generally, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

Looking at the totality of the circumstances, *see Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and in consideration of the following: that the petitioner has been in business for over five years, that the petitioner can demonstrate its ability to pay the proffered wage for two years, and is not significantly below the wage in the third year; that the petitioner has demonstrated partial payment to the beneficiary; and that the business' federal tax returns do not exhibit substantial liabilities, we would consider bank statements under these circumstances to aid in establishing the petitioner's ability to pay the proffered wage. Based on the foregoing, we find that the petitioner can establish its ability to pay the proffered wage.

A second point not raised in the director's denial was the petitioner's failure to document that the beneficiary had all of the education, training, and experience as required in the certified ETA 750. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(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 beneficiary must demonstrate that he had the required skills by the priority date of April 19, 2001: On the Form ETA 750A, the "job offer" states that the position requires three years of experience in the job offered, with job duties including: "Plans menus, prepares and cooks variety of Japanese and Sushi dishes, desserts and other foods according to recipes using fresh ingredients such as Daikon and roots, such as Hakusai, Kabocha, Nasu, Matsutake, mushrooms, Kombu, Nagangi, Miso, Shoyu, goma, rice, beans, sprout, pastes, sauces. Prepares fresh fish, shell-fish, meats, soups, vegetables and sauces. Portions and garnishes food." The petitioner did not list that the position required any education in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed prior experience as: (1) [REDACTED] November 2000 to present (April 17, 2001, the date the form was signed); (2) [REDACTED] New York, New York, from July 1997 to October 2000 as a Specialty Cook, Japanese Cuisine; (3) Sharaku Japanese Restaurant, New York, New York, from November 1991 to 1996 as a Specialty Cook, Japanese Cuisine; and (4) [REDACTED] Restaurant, New York, New York, from April 1990 to November 1991 as a Specialty Cook, Japanese Cuisine.

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letter:

Letter from [REDACTED], from the President, [REDACTED]
Dates of employment: November 1991 to 1996 (the letter does not specify whether the position was full-time or part-time, and does not list the number of hours worked per week);
Title: not listed;
Job Duties: not listed.

The letter is insufficient to document that the beneficiary has the required three years of experience as a specialty cook of Japanese cuisine. The letter does not list the beneficiary's title or job duties, so that we cannot verify that he worked as a Japanese specialty cook, as opposed to another position within the restaurant. The petitioner did not submit any further documentation to demonstrate the beneficiary's prior experience. As the beneficiary has other experience listed, and CIS did not request further information in its NOID, the petitioner should be afforded an opportunity to address this issue either by obtaining additional information from the original author of the letter, or by providing a letter from one of his other prior employers.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.