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20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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EAC-04-150-51039

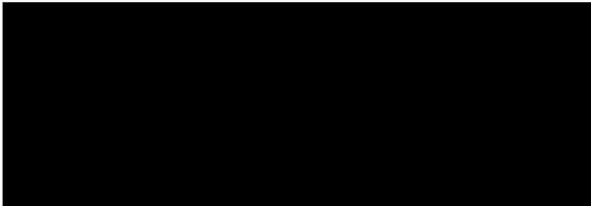
Office: VERMONT SERVICE CENTER

Date: JAN 23 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese food specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The petition was denied accordingly. The director also determined that the Form ETA 750 was not approvable at the time of filing because the position was not available and the business was not in operation then. The director invalidated the labor certification accordingly.

The record shows that the appeal 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.

As set forth in the director's March 14, 2005 denial, the first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 appeal¹. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2003, the beneficiary's W-2 forms and payroll records for 2002 and 2003, the petitioner's quarterly reports for all four quarters of 2003, and bank statements for the petitioner's accounts covering June 2001, January to December 2002, January to December 2003, and January to November 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the petition, the petitioner claimed to have been established on December 10, 2001, to have a gross annual income of \$513,262, to have a net annual income of \$17,000, and to currently employ 5 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B signed by the beneficiary on April 20, 2001, she did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's bank monthly balances were sufficient to pay the beneficiary the proffered wage or the difference between wages paid and the proffered wage for 2001 through 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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. In the instant case, the petitioner submitted the beneficiary's W-2 forms and payroll records. These documents do not establish that the petitioner hired and paid the beneficiary any compensation in 2001, but show that the petitioner paid the beneficiary \$9,500 in 2002, and \$20,350 in 2003. The record contains a fax copy of the beneficiary's paycheck stub showing as of December 20, 2004 the beneficiary was paid by the petitioner \$24,000 in 2004. The petitioner does not submit the beneficiary's W-2 form or other documentary evidence for the beneficiary's compensation in 2004 on appeal. Even though the fax copy of paycheck was accepted as evidence for 2004 compensation, the petitioner failed to demonstrate that it paid the beneficiary the full proffered wage from 2001 to 2004. The petitioner is obligated to demonstrate that it could pay the proffered wage of \$24,689.60 in 2001, and the difference of \$15,189.60 in 2002, \$4,339.60 in 2003 and \$689.60 in 2004 between wages actually paid to the beneficiary and the proffered wage.

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):

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, without consideration of depreciation or other expenses. 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). Reliance on its gross income and gross profit on appeal is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's federal tax returns for 2001 through 2003. The petitioner's tax returns for 2001 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage and/or the difference between wages actually paid to the beneficiary and the proffered wage from the priority date:

- In 2001, the Form 1120 stated a net income² of \$(274).
- In 2002, the Form 1120 stated a net income of \$(17,124).
- In 2003, the Form 1120S stated a net income³ of \$(13,675).

² Taxable income before net operating loss deduction and special deductions on Line 28 of the Form 1120.

³ 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. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage respectively.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were \$3,297.
- The petitioner's net current assets during 2002 were \$20,453.
- The petitioner's net current assets during 2003 were \$15,429.

Therefore, for the year 2001 the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage of \$24,689.60, however, the petitioner did not have sufficient net current assets to pay the beneficiary the difference of \$15,189.60 in 2002 and \$4,339.60 in 2003 between wages actually paid to the beneficiary and the proffered wage.

The record contains copies of the bank statements for the petitioner's bank accounts. Counsel asserts that the petitioner established its ability to pay the proffered wage with balances in its bank accounts. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional

rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

⁴According 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.

available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage for 2001, the year of the priority date, through an examination of wages paid to the beneficiary, or its net income; or net current assets.

On appeal, counsel refers to decisions issued by the AAO concerning bank statements in determining the petitioner's ability to pay the proffered wage, but does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in the year of the priority date. The evidence submitted does not establish that the petitioner had the ability to pay the proffered wage beginning on the priority date.

The second issue in the instant case is whether or not the petitioner misrepresented the job to DOL in the labor certification process, and therefore, the labor certification is deemed invalid.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date. To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must look to the job offer portion of the 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, was filed on April 26, 2001 and the job offer consists of the name of job title: "Chinese Food Specialty Cook"; the name of employer: "Sizzling Express VIII, Inc.", the instant petitioner; and the location of the employment: "8444 West Park Drive, McLean, Virginia 22102".

The director determined that the record does not establish that the position was available because the business was not in operation at the time the job offer was made. After consultation with DOL, the director determined the Form ETA 750 was not approvable at the time of filing and invalidated it pursuant to 20 C.F.R. § 656.30 as of February 9, 2005.

On appeal counsel argues that a sponsoring employer which has made detailed preparations to begin business operations may file a labor certification application on behalf of the intended beneficiary even if the employer has not commenced operations as of the filing date of the ETA 750 job offer. Counsel refers to Board of Labor Certification Appeals (BALCA) cases concerning approval of labor certification where employers sponsored workers for expansion of existing business into new market.

Section 212(a)(6)(C)(i) of the Act provides that “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.”

The AAO finds that the petitioner made a fraudulent or willful misrepresentation of a material fact involving the labor certification application, and therefore the director correctly invalidated the labor certification. First of all, the labor certification was filed by the petitioner and accepted by DOL on April 26, 2001. However, the petitioner claimed on the Form I-140 that it was established on December 10, 2001, more than six months after the labor certification application was filed with DOL. The record shows that the business did not exist, the position was not available and the job opportunity could not be open to any qualified U.S. workers as required by 20 C.F.R. § 656.20(c) at that time, and therefore, the job offer was not a realistic one. The record does not contain any evidence showing that DOL knew that the business was not established yet during the certification application process. The Form I-140 also indicates that the position is not a new position. The petitioner did not explain how a non-existing business or even per counsel’s argument a new business in preparation of operation has an existing position of cook. The misrepresentation of non-realistic job offer is of a material fact in the labor certification application processing. A petitioner must establish the beneficiary’s eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal counsel cites *Matter of Mouren-Laurens Oil Co., Inc.* 91 INA 236 (BALCA). Counsel does not state how these rules applied by BALCA are applicable to the instant petition before the Department of Homeland Security’s AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: “After issuance labor certifications are subject to invalidation by the [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application.” Accordingly the director’s decision to invalidate the labor certification is affirmed.

Beyond the director’s decision and counsel’s assertions on appeal, the AAO has identified an additional ground of ineligibility. We will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date as set forth on the Form ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*. 345 F.3d 683 (9th Cir. 2003); *see also 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 certified Form ETA 750 in the instant case indicates that the position offered is “Chinese Food Specialty Cook” and that the position requires two (2) years of experience in the job offered as a Chinese food specialty cook. The Form ETA 750 does not indicate that the petitioner will accept any experience in related occupation in lieu of the one in the job offered.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record of proceeding contains the notarial certificate of career (employment) dated March 12, 2001 from Hosung Foods Co. Ltd. with English translation. This notarial certificate of career (employment) states in pertinent part that:

Position: Cook (Korean Foods)
Dept.: Dinning Hall (Cooking)
Service Period: From Jan. 1, 1992 to March 30, 1997

The certificate is with the company's name, address and affixed with seal of _____ Representative Director of _____. However, the certificate does not indicate that the beneficiary was a Chinese Food Specialty Cook for the company and does not include a specific description of the duties performed by the beneficiary as required by the regulation at 8 C.F.R. § 204.5(g)(1). Without a specific description of the duties performed by the beneficiary in the position of Korean cook at _____ is not clear whether the beneficiary possessed the requisite two years of experience in the position of Chinese Food Specialty Cook. The petitioner did not explain how the beneficiary's experience in the position of Korean Food cook qualifies her to meet the two years of experience in the job of a Chinese Food Specialty Cook as set forth on the Form ETA 750. Therefore, the petitioner failed to demonstrate that the beneficiary qualified for the proffered position with the certificate of career (employment) from _____.

The instant petition was signed by _____ and the record of proceeding shows that he is the president of the company and owns 100% of the common stock. The record also contains a copy of Family Census Register for the family of the beneficiary's husband. The original Korean Family Census Register indicates that the beneficiary's husband, _____ has a younger brother named _____, although the translator did not translate for those parts whose registers were moved out. It is possible that the petitioner is the brother-in-law (husband's younger brother) of the beneficiary and the beneficiary is the sister-in-law (younger brother's wife) of the petitioner. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

The AAO also notes that in the instant case, S _____ was the attorney of record in the labor certification application. Mr. _____ was convicted of several federal offenses relating to the fraudulent procurement of immigrant labor certifications and the filing of fraudulent immigrant worker visa petitions. Due to the size and scope of the immigration fraud committed by _____ the director should have forwarded this case to a fraud investigation. On the instant Form ETA 750 the signature of the beneficiary is apparently different from her signatures on all other documents. It seems likely that the instant labor certification application could be another fraudulent labor certification applications processed by _____. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.