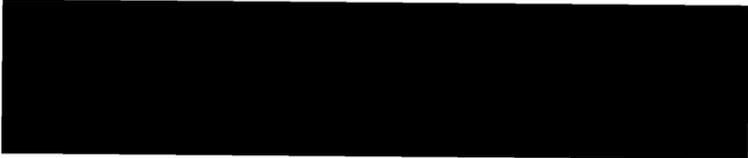


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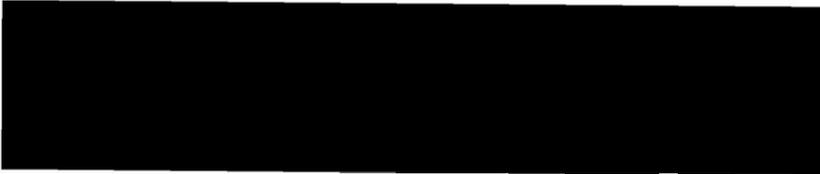
Office: VERMONT SERVICE CENTER

Date: JUL 03 2007

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

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

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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 cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and that the beneficiary possessed the experience requirements of the labor certification. The director denied the petition accordingly.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original February 1, 2006 denial, the issues in this case are 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 and whether the beneficiary meets the experience requirements of the labor certification.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour or \$24,960 annually.

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<sup>1</sup>. Relevant evidence submitted on appeal includes a statement from counsel and a copy of a letter, dated March 30, 2006, from [REDACTED] Tax Consultant. Other relevant evidence includes copies of the petitioner's 2001 through 2004 Forms 1120, U.S. Corporation Income Tax Returns, and copies of Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary for the years 2003 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2004 Forms 1120 reflect taxable income before net operating loss deduction and special deductions or net income of -\$16,334, \$12,817, -\$1,004, and -\$1,999, respectively. The petitioner's 2001 through 2004 Forms 1120 also reflect net current assets of \$54,788, -\$28,526, -\$97,502, and \$25,498, respectively.

The 2003 and 2004 Forms W-2, issued by the petitioner for the beneficiary, reflect wages earned by the beneficiary of \$22,484.17 in 2003 and \$25,641.22 in 2004.

The letter from [REDACTED] states:

The balance sheet reflects the historical costs to the corporation. If you will note, all of the assets of the company, real estate and furniture and fixtures have been fully depreciated and reflect no book value. In fact, the real estate alone is conservatively valued at \$500,000.00 which would include the land, which is carried at \$10,000.00. Additionally, the liquor license of the corporation is carried at its [sic] cost, \$10,030.00 which was acquired in 1971 and is conservatively valued at \$175,000.00. Therefore, if these two assets alone were carried at market value instead of cost, the assets would increase by \$654,970.00 with no corresponding increase in liabilities.

On appeal, counsel claims that the "decision of the center director is factually incorrect. The submitted corporate tax return document that the petitioner had sufficient cash and payroll to be able to pay the proffered wage in 2002-2003."

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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by

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<sup>1</sup> 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).

documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 16, 2001, the beneficiary claims to have been self-employed from May 2000 to the present. However, counsel has provided copies of the beneficiary's 2003 and 2004 Forms W-2. Therefore, the petitioner has established that it employed the beneficiary in 2003 and 2004. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$24,960 and the actual wages paid to the beneficiary in the pertinent years (2001 through 2004). In the instant case, however, counsel has only submitted Forms W-2 for 2003 and 2004. Therefore, the petitioner must establish that it has sufficient funds to pay the entire proffered wage of \$24,960 for 2001 and 2002. In 2003, the difference between the proffered wage of \$24,960 and the actual wages paid of \$22,484.17 to the beneficiary was \$2,475.83. In 2004, the petitioner paid the beneficiary \$25,641.22 or 681.22 more than the proffered wage of \$24,960. The petitioner has established its ability to pay the proffered wage of \$24,960 in 2004 as it did, in fact, pay the beneficiary more than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2004 were -\$16,334, \$12,817, -\$1,004, and -\$1,999, respectively. The petitioner could not have paid the proffered wage of \$24,960 from its net income in 2001 and 2002. In addition, the petitioner could not have paid the difference of \$2,475.83 between the proffered wage of \$24,960 and the actual wages paid to the beneficiary of \$22,484.17 from its net income in 2003.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.<sup>2</sup> 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 a corporation's end-of-year 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. The petitioner's net current assets in 2001 through 2004 were \$54,788, -\$28,526, -\$97,502, and \$25,498, respectively. The petitioner could have paid the proffered wage of \$24,960 in 2001 from its net current assets, but not in 2002. In addition, the petitioner could not have paid the difference of \$2,475.83 between the proffered wage of \$24,960 and the actual wages paid to the beneficiary of \$22,484.17 in 2003 from its net current assets. The petitioner could have paid the proffered wage of \$24,960 from its net current assets in 2004.

On appeal, counsel contends that the "decision of the center director is factually incorrect. The submitted corporate tax return document that the petitioner had sufficient cash and payroll to be able to pay the proffered wage in 2002-2003."

Counsel is mistaken. While the petitioner's 2001 tax returns establish its ability to pay the proffered wage through its net current assets, and the beneficiary's 2004 Form W-2 shows that he was compensated more than the proffered wage in 2004, the petitioner's 2002 and 2003 tax returns fail to establish its ability to pay the proffered wage of \$24,960 through either its net income or its net current assets.

On appeal, [REDACTED] states that the petitioner's assets would increase by \$654,970.00 if the assets (real estate and liquor license) were carried at market value instead of cost. However, real estate is considered a long-term liability and cannot be considered in determining the petitioner's ability to pay the proffered wage. See the above discussion on net current assets. In addition, the petitioner's liquor license would be considered essential to the petitioner's successfully doing business as a restaurant/tavern, and the AAO would not consider the liquor license as an asset that could be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Again, see the above discussion on net current assets.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 1971. The petitioner has provided tax returns for the years 2001 through 2004. However, although the petitioner has been in business for thirty six years, the petitioner has only been able to establish its ability to pay the proffered wage of \$24,960 for two of those years. There also is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner's reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. In order to meet the requirements of *Sonogawa*, the petitioner would need to provide additional documentation to support its claim of establishing its ability to pay the proffered wage of \$24,960 (i.e., tax returns before 2001 and after 2004 that show that the petitioner consistently had positive net incomes or net current assets, additional Forms W-2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary for the pertinent years).

The petitioner's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$16,334 and net current assets of \$54,788. The petitioner could have paid the proffered wage of \$24,960 from its net current assets in 2001.

The petitioner's 2002 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$12,817 and net current assets of -\$28,526. The petitioner could not have paid the proffered wage of \$24,960 from either its net income or net current assets in 2002.

The petitioner's 2003 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$1,004 and net current assets of -\$97,502. The petitioner could not have paid the difference of \$2,475.83 between the proffered wage of \$24,960 and the actual wages of \$22,484.17 paid to the beneficiary from either its net income or its net current assets in 2003.

The petitioner's 2004 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$1,999 and net current assets of \$25,498. The petitioner could have paid the proffered wage of \$24,960 from its net current assets in 2004. In addition, the beneficiary was compensated \$25,641.22 or \$681.22 more than the proffered wage of \$24,960 in 2004.

For the reasons stated above, the petitioner has not established its ability to pay the proffered wage of \$24,960 from the priority date of April 5, 2001 and continuing to the present.

The second issue in this case is whether the beneficiary met the experience requirements of the labor certification as of the priority date of April 5, 2001.

The regulation at 8 C.F.R. § 204.5(l)(3) states, 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.

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 5, 2001.

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).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess two years of vocational training and two years of experience in the job offered as a cook. Block 15 has no additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of cook must have two years of vocational training and two years of experience in the job offered as a cook.

In the instant case, counsel provided a letter from Tourism College Killybegs, Co. Donegal, Ireland, dated September 7, 2005 and signed by [REDACTED] **Clerical Officer, that states that the beneficiary commenced a two year National Certificate in Professional Cookery on Monday, September 15, 1997 and successfully completed the course in October 1999. Therefore, the petitioner has established that the beneficiary met the training requirements of the labor certification as of the priority date of April 5, 2001.**

Counsel also submitted a letter, dated September 27, 2005 and signed by [REDACTED] Group Financial Controller, from Clanmaca Company, Ltd. that states the beneficiary worked for Clanmaca during the period 1998 to 2000 in a full-time capacity as a chef in the kitchens of the Hotel Clanree, Letterkenny, Co. Donegal.

Counsel was informed in a request for evidence from the director, dated August 19, 2005, that “evidence relating to qualifying experience or training should be in the form of letter(s) from current or former employer(s) or trainer(s), and should include the name, address and title of the writer. A specific description of the duties performed by the alien or of the training received as well as the beginning and ending dates of employment should be provided in the letters submitted. Experience/training received through prior employment should be documented by the prior employer. If such evidence is unavailable, other documentation relating to the alien’s experience will be considered.” In this case, the letter from Conor McBride does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter fails to supply the specific duties of the position of chef or the exact dates of the beneficiary’s employment. The petitioner has not shown that the beneficiary had the full two years experience as of the priority date. For this reason, the petition may not be approved.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

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.