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FILE: [REDACTED]  
EAC-04-030-54194

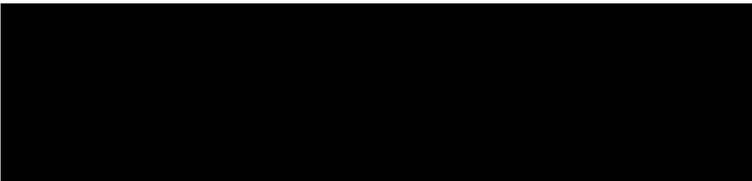
Office: VERMONT SERVICE CENTER

Date: **SEP 10 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 foreign food specialty cook (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 (DOL). 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 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 10, 2005 denial, the only 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B signed on January 10, 2001, the beneficiary did not claim to have worked for the petitioner.<sup>1</sup> On the petition, the petitioner claimed to have a gross annual

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<sup>1</sup> On the Form G-325A signed by the beneficiary on October 1, 2003, the beneficiary stated that he had been

income of \$817,465 and a net annual income of \$15,154. However, the petitioner did not provide information about its date of establishment, and the number of current employees.

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>2</sup>. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2003, W-2 forms for 2001 through 2003 for the petitioner's employees, 2004 W-2 form for the owner of the petitioner, and the beneficiary's paystubs covering from January 2005 to August 2005. The record does not contain any other evidence pertinent to the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner established its continuing ability to pay the proffered wage as of the priority date through the petitioner replacing previous employees, the petitioner's officers foregoing officers' compensation and the beneficiary being currently paid the proffered wage.

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 did not submit any evidence to show that the petitioner paid the beneficiary any amount of compensation in the relevant years 2001 through 2004, but just the beneficiary's paystubs for the first seven months of 2005. The paystubs show that the petitioner had been paying the beneficiary at the level of \$18.99 per hour (\$759.60 per week) since January 2005, which is greater than the proffered wage rate set forth on the Form ETA 750. Counsel asserts that the petitioner established its continuing ability to pay the proffered wage as of the priority date since the petitioner has paid the beneficiary at the proffered wage rate since January 2005. However, counsel's reliance on the beneficiary being paid at the proffered wage rate currently in determining the petitioner's continuing ability to pay the proffered wage is misplaced. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage *beginning* on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when counsel claims the petitioner actually began paying

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self-employed on various jobs from 1993 to the present.

<sup>2</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) and 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).

the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. In the instant case, the petitioner failed to establish its ability to pay the proffered wage in 2001 through 2004. Therefore, the petitioner is still obligated to demonstrate that it could pay the proffered wage with its net income or net current assets in 2001 through 2004.

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 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 Chang* at 537.

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2003 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns, the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. The petitioner's tax returns for 2001 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$39,291.20 per year from the priority date:

- In 2001, the Form 1120S stated a net income<sup>3</sup> of \$15,054.

<sup>3</sup> 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."

- In 2002, the Form 1120S stated a net income of \$8,190.
- In 2003, the Form 1120S stated a net income of \$2,631.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the 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>4</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 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 \$(43,706).
- The petitioner's net current assets during 2002 were \$(33,641).
- The petitioner's net current assets during 2003 were \$(29,136).

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 to 2003 through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel asserts in her brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. On appeal, counsel submits a letter dated August 16, 2005 from [REDACTED] the president of the petitioner, claiming that

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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 line 23 or line 17e of the **Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc.** 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>.

<sup>4</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.

the beneficiary will replace [REDACTED], who left in 2001, [REDACTED], and [REDACTED] who left in 2002 and 2003, as a cook and submits their W-2 forms as proof of their employment. The record does not, however, indicate the total number of cook positions in the restaurant, verify these five employees' full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. Counsel does not explain how the beneficiary could replace five previous employees. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the five previous employees involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented their positions, duties, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them. Therefore, the petitioner did not establish that it had sufficient funds to pay the beneficiary the full proffered wage from the priority date to present through the replacement of employment method.

In the same letter, [REDACTED] certifies that the petitioner had the ability to pay the proffered wage in 2004 to the beneficiary from her salary, \$42,400.00 and attached her W-2 form for 2004. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock. According to the petitioner's Form 1120S line 7 Compensation of Officers, the petitioner elected to pay herself \$0 in 2001, \$35,200 in 2002, and \$41,600 in 2003, respectively. However, [REDACTED] does not submit her W-2 forms for 2002 and 2003, nor does she claim to forego her officer's compensation for 2002 and 2003 to pay the beneficiary the proffered wage. The record contains a copy of [REDACTED]'s W-2 form for 2004 in the amount of \$42,400 which she claims she could and would forego to pay the beneficiary the proffered wage. However, the record does not contain the petitioner's 2004 tax return, and thus, the AAO cannot verify whether or not the amount of \$42,400 reflected on the W-2 form was paid to [REDACTED] as compensation of officer. Therefore, the petitioner did not submit sufficient evidence for its sole shareholder to forego this amount to pay the beneficiary the proffered wage.

In addition, the record does not contain any documentary evidence of [REDACTED]'s personal financial situation. It is not clear how much income other than the salary of \$42,400 [REDACTED] did earn from the petitioner, how much total income her household received, and how much living expenses for the family were needed in that year. Even if it is established that the amount of \$42,400 was the officer's compensation paid by the petitioner to [REDACTED], if that amount were the total or significant income for [REDACTED] family in 2004, she could not have supported her family's living expenses that year with the balance of \$3,108.80 after she had paid the beneficiary the proffered wage of \$39,291.20 from her salary of \$42,400. Although the sole shareholder of the petitioner is willing to forego her officer's compensation to be used to pay the beneficiary the proffered wage, the AAO does not generally accept such a method to establish the petitioner's ability to pay the proffered wage because it is not likely that the shareholder will forego her officer's compensation to pay the proffered wage if as result the owner would have insufficient funds to support her own family. Therefore, the petitioner has not demonstrated that [REDACTED] were able to forego a significant percentage of her compensation in 2004 and thus the petitioner has not established its ability to pay the proffered wage in 2004 through the examination of officers' compensation.

Counsel'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 from the day the Form ETA 750 was accepted for processing by the Department of Labor.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience as a cook prior to the priority date. 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                    |         |
|-----|--------------------|---------|
| 14. | Experience         |         |
|     | Job Offered        | 2 years |
|     | Related Occupation | 0       |

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on January 10, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been self-employed doing various jobs since July 1990. Prior to that, he worked as a full time cook for EMH Especialidades Metalicas Hermanos, S.A. de C.V. at Norte 72 No. 6128, [REDACTED], C.P. 07830, Mexico, D.F. from July 1987 to July 1989. He does not provide any additional information concerning his employment background on that form.

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.

The record contains a copy of an experience letter dated January 26, 2001 from Engineer [REDACTED] General Manager of EMH Metal Specialties Hermanos, S.A De C.V. at Norte 72 No. 6128, Col. [REDACTED]

C.P. 07830, Mexico, D.F. This experience letter is in Spanish with an English translation. The English translation of the letter stated concerning the beneficiary's work experience in pertinent part that:

I, [REDACTED], hereby certify that [the beneficiary] worked in our company, located in Mexico city[sic] from July 14, 1987 to July 19, 1989 as [sic] cook from 9:00 am to 5:00 pm, 40 hours weekly, at a salary of 498 Mexican Pesos.

The letter was from the beneficiary's former employer on the company's letterhead and included a description of duties the beneficiary performed. This experience letter also verified the beneficiary's full-time employment and two years of experience as a cook. However, the company is a construction company specializing in metal works. The former employer does not explain why a construction company has a full-time cook position. Further, it seems more than coincident that the beneficiary happened to work exactly two years as a cook to meet the minimum requirements for the proffered position. The record does not contain any independent objective evidence, such as the beneficiary's payroll records with that company, cancelled paychecks, tax filing records, the organizational chart of the company, personnel records, etc. to prove that the construction company had a full-time cook position and the beneficiary worked as a full-time cook for the company during the two years from July 1987 to July 1989. The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The record of proceeding does not contain any other evidence to support the beneficiary's qualifications. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750.

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.