U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 13 2008

LIN 03 238 50158

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[redacted]

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.

Kevin S. Bonlos for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an Irish restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA-750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.

The director denied the petition because he determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director stated that the petition might also be denied based on the fact that the petitioner had failed to establish that it is a legal entity qualified to petition for an alien beneficiary as a U.S. employer. In addition, the director denied the petition because the petitioner did not submit completed, signed tax returns as requested in the director's July 30, 2004 request for evidence (RFE). Finally, the director denied the petition because he found that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date forward.

The record shows that the appeal is properly filed and 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 denial, the central issues in this case are: whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position; whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; whether the petitioner failed to provide requested evidence; and whether the petitioner is qualified to petition for an alien beneficiary as a U.S. employer.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA-750 as certified and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The DOL accepted the Form ETA-750 in this matter on April 25, 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either 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 regulation at 8 C.F.R. § 103.2(b)(13) states in relevant part:

> Effect of failure to respond to a request for evidence or appearance. If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the application or petition. *See* 8 C.F.R. § 103.2(b)(14).

The regulation at 8 C.F.R. § 204.5(c) regarding who may file a petition states in relevant part:

> Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act.

United States employer is defined at 8 C.F.R. § 214.2(h)(4)(ii)(4) which states in pertinent part:

> United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
> (3) Has an Internal Revenue Service Tax identification number.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See,* e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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).

On appeal, counsel submits a brief dated April 4, 2005. Other relevant evidence in the record includes: two letters of employment from Manse Restaurant, one which is undated and one which is dated September 23, 2004; the petitioner's letters dated October 17, 2002 and June 27, 2003, respectively, which document the beneficiary's employment with the petitioner; a National Restaurant Association Educational Foundation ServSafe Certification certificate issued to the beneficiary which is valid from February 15, 2001 through February 15, 2006; and a Chicago Department of Health Certified Foodservice Manager certificate issued to the beneficiary on February 15, 2001 which expired on February 15, 2006. In addition, extracts from the DOL's *Dictionary of Occupational Titles* relating to certain positions such as that of cook and sous chef were submitted. The record also contains copies of the Internal Revenue Service (IRS) Forms 1065, U.S. Return of

Partnership Income, for 2001, 2002 and 2003[1] for Traveler's Tavern, Inc. J. Patrick, which are not signed by a limited liability company member; a copy of the beneficiary's IRS Form W-2, Wage and Tax Statement, for 2003, and a copy of the beneficiary's IRS Forms 1099-MISC, Miscellaneous Income, for 2001 and 2002.

The record does not contain any other evidence relevant to: the beneficiary's qualifications; the petitioner's ability to pay the beneficiary the proffered wage; the petitioner's claim that it is eligible to petition for an alien beneficiary as a U.S. employer; and the petitioner's claim that it was not required to provide evidence listed in the director's RFE.

On appeal, counsel asserts that the beneficiary had two years of qualifying experience as a cook as of the priority date, that the petitioner had demonstrated its ability to pay the proffered wage, and that because the petitioner provided Forms W-2 which established its ability to pay the wage, it was not obligated to provide other evidence requested by the director relating to its ability to pay the wage such as signed tax returns. Counsel also indicated that the petitioner had established that it had an IRS tax identification number and that, in turn, it was eligible as a U.S. employer to petition for the beneficiary.

Regarding the point that the petitioner did not submit requested evidence, the director pointed out in the July 30, 2004 RFE that the petitioner had failed to provide copies of its tax returns that were complete and signed. The director indicated that the tax returns as submitted were not acceptable and requested that the petitioner submit signed tax returns. In his decision, the director stated that the petitioner had again failed to provide copies of its tax returns, signed by the petitioner's representative, when responding to the RFE. The director stated that unsigned tax returns may not be considered final or complete. Thus, the director denied the petition in part, pursuant to 8 C.F.R. § 103.2(b)(13), because the petitioner failed to provide requested evidence. The petitioner has not overcome this basis of denial on appeal.

First, counsel asserts on appeal that because the petitioner provided Forms W-2 which establish the petitioner's ability to pay the wage, the signed tax returns requested by the director were not needed. This assertion is not persuasive. Moreover, in his decision, the director emphasized by means of a detailed analysis of the petitioner's evidence that the petitioner had not established by the Forms W-2 or by the Forms 1099-MISC in the record an ability to pay the proffered wage from the priority date forward. These documents demonstrate that the beneficiary was paid less than the proffered wage during 2001, 2002 and 2003.

Further, as indicated by the director in his decision, it is not clear whether the tax returns and Forms W-2 and Forms 1099-MISC in the record relate to the petitioner, and the petitioner's inability to produce any completed, signed tax returns in response to the RFE and again on appeal calls further into question whether the tax returns in the record are those of the petitioner.

Specifically, the AAO notes that the Form I-140, Immigrant Petition for Alien Worker, lists the petitioner as J. Patrick's Irish Pub & Restaurant, 1367 W. Erie, Chicago, Illinois. The Form ETA-750 as certified also lists this same information for the employer. However, the tax returns in the record are for Traveler's Tavern, Inc. J. Patrick. The Forms W-2 and the Forms 1099-MISC in the record are issued by Travelers Tavern LLC. The address listed for Travelers Tavern LLC on those documents is identical to that of the petitioner. The 2001 tax return in the record lists an address for Traveler's Tavern, Inc. J. Patrick that is also the same as that of the petitioner. However, the address listed on the 2003 tax return in the record is slightly different from that of the petitioner, and the address listed on the 2002 tax return is apparently that of a tax preparer.

[1] In his decision dated March 3, 2005, the director indicated that the petitioner had submitted a tax return for 2004. This is not correct. The information that the director listed in the decision and attributed to a 2004 tax return is in fact the information from the 2003 tax return in the record.

In addition, as the director stated in his decision, the petitioner failed to list its tax identification number where requested to do so on the Form I-140 and failed to provide any other evidence that it is qualified to petition for an alien beneficiary as a U.S. employer. On appeal, counsel claims that the petitioner's tax identification number is listed on the tax returns, wage statements and miscellaneous income statements in the record. However, this assertion does not overcome the director's ground of denial. The director clearly indicated in his decision that the tax returns and wage statements in the record list a company name that is not the same as that of the petitioner, and that the petitioner listed no tax identification number for itself on the petition that might link it with the tax returns and wage statements. Also, there is no direct evidence in the record that the petitioner and Traveler's Tavern, Inc. J. Patrick are the same entity. In addition, there is no direct evidence of record that the petitioner has a tax identification number, that it files tax returns or generates wage statements. The director pointed out that the record also did not include the petitioner's Articles of Incorporation, Illinois state registrations, or any other evidence to demonstrate that the petitioner, J. Patrick's Irish Pub & Restaurant, is a legal entity eligible to petition for an alien beneficiary as a U.S. employer pursuant to 8 C.F.R. § 204.5(c). The record includes only counsel's statements that the petitioner, Traveler's Tavern, Inc. J. Patrick and Traveler's Tavern, LLC are the same legal entity.[2] The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel does not provide: a copy of the petitioner's Articles of Incorporation; evidence that Traveler's Tavern and the petitioner are the same legal entity; or other evidence to substantiate that the petitioner is a U.S. employer eligible to petition for an alien beneficiary. Thus, the petitioner has failed to establish that it is a U.S. employer eligible to petition for an alien beneficiary.[3]

Further, beyond the decision of the director, the petitioner has not established that the job opportunity is bona fide. The Illinois Secretary of State online database of corporations in Illinois indicates that the beneficiary is the owner or general partner of Traveler's Tavern, LLC, 1367 W. Erie, Chicago, Illinois. *See* http://www.ilsos.gov/corporatellc/CorporateLlcController (accessed April 23, 2008).[4] In its corporate record posted online, the beneficiary is listed as Traveler's Tavern LLC's only registered agent. The beneficiary's address as stated on the Form I-140 is listed as well, confirming that the Declan Morgan listed on this website is the same individual listed as the beneficiary on the instant petition. The Illinois Secretary of State online records indicate that the beneficiary has been the registered agent for this entity since it first registered with the State of Illinois on May 18, 2000 and through April 30, 2007, which is apparently the last date on which the Illinois Secretary of State's online information was updated. The AAO would emphasize as well that on

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[2] It is noted that the record also includes: the petitioner's letter dated October 17, 2002 on which the petitioner's representative stated that J. Patrick's Irish Pub & Restaurant is owned by Carlucci's Hospitality Group; and the petitioner's letter dated June 27, 2003 on which the petitioner's representative stated that J. Patrick's Irish Pub & Restaurant is owned by Travelers' Tavern, LLC. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[3] The AAO is also not able to find the petitioner, J. Patrick's Irish Pub & Restaurant, listed at the Illinois Secretary of State online database of Illinois corporations. *See* http://www.ilsos.gov/corporatellc/Corporate LlcController (accessed April 23, 2008).

[4] When searching for this entry, select "LLC", "File Number", and enter "[redacted]" as the file number or search term.

the 2002 Form 1065, Schedule B, page 2, the beneficiary is listed as the general partner who is designated as the tax matters partner for Traveler's Tavern, Inc. J. Patrick.

If the petitioner were able to document that J. Patrick's Irish Pub & Restaurant and Traveler's Tavern, LLC are the same legal entity, the record, incorporating information from the Illinois Secretary of State's corporate website, would then indicate that the petitioner is owned by the beneficiary. Thus, it is prohibited from petitioning for the beneficiary. As such, if the petitioner and Traveler's Tavern, LLC are the same legal entity, the beneficiary's general partner or ownership role of the petitioner represents an additional basis for denying the petition. That is, pursuant to 20 C.F.R. § 656.20(c)(8)(2004)[5] the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (October 15, 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or the relationship may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (May 15, 2000). Where the petitioner is owned by the person applying for the proffered position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992)(which indicates that the labor certification application was denied based on the fact that the intended beneficiary was the president, sole shareholder and chief cheese maker of the U.S. employer, even where no other person qualified for the position had applied.)

A petition that fails to comply with the technical requirements of the law may be denied by the AAO on that basis even if the director does not identify such ground 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).[6]

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[5] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the acronym PERM for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation became effective on March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. The instant labor certification application was filed prior to March 28, 2005 and thus is governed by the prior regulations. This citation is to the DOL regulations as in effect prior to the PERM amendments.

[6] Further, certain restaurant reviews posted at the Center Stage City Guide for the city of Chicago web page located at http://centerstagechicago.com/patronreviews/pr.cfm?ID=2419&which=place (accessed April 23, 2008) specify that J. Patrick's Irish Pub & Restaurant, 1367 W. Erie, Chicago, currently operates under the name J. Patrick's Irish Pub & Grill, and that it changed ownership during summer 2007. Thus, even if the petitioner could establish that J. Patrick's Irish Pub & Restaurant and Traveler's Tavern, LLC are the same legal entity, and could establish that the beneficiary did not own the petitioner at the time that the Form ETA-750 was filed, it appears that the petitioner sold its restaurant subsequent to the certification of the Form ETA-750. Yet, there is no evidence of record that the current owner is a successor in interest to the original petitioner, or that this owner is interested in actively pursuing the instant petition and providing the beneficiary a job offer. When an existing, approved Form ETA-750 is to be used by a company other than the company to which it was issued, the substituted employer must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. If the petitioner attempts to overcome today's decision with a motion, it should address whether the applicant on the Form ETA-750 as certified has sold its interest in the company.

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, April 25, 2001. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA-750 is $50,000 annually.[7] On the Form ETA-750B, signed by the beneficiary on August 22, 2002, the beneficiary claimed to have worked for the petitioner beginning in June 2000 and continuing through the date that he signed the Form ETA-750B.

The petitioner filed the Form I-140 on August 4, 2003. On the petition, the petitioner claimed to have been established in 2000, to currently have twenty employees, and to have a gross annual income of $500,000.00. The petitioner left blank the box on the petition where it was to list its net annual income.

On appeal, counsel states that because the priority date in this matter is April 25, 2001, more than one-fourth of the way into the year 2001, the petitioner needs only to show an ability to pay three-fourths of the proffered wage in 2001. Counsel also asserts that the petitioner established its ability to pay the wage in 2002 and 2003.

First, this office will not prorate the proffered wage such that the petitioner is only obliged to show an ability to pay a fraction of the proffered wage based on the fraction of the year which follows the April 25, 2001 priority date. That is, the AAO will not apply 12 months of net income towards an ability to pay a lesser period of the proffered wage, any more than it would apply 24 months of net income towards an ability to pay the annual proffered wage. CIS will only prorate the proffered wage if the record contains evidence of the net income earned or the wages paid to the beneficiary by the petitioner during that specific portion of the year that occurred after the priority date, such as monthly income statements or pay stubs. In this instance, the petitioner has not submitted such evidence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA-750 establishes a priority date for any immigrant petition later based on the Form 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 wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 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 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 wage.

The record contains copies of the Forms 1099-MISC for 2001 and 2002 issued by Travelers Tavern LLC for the beneficiary. It also contains copies of the Forms W-2 for 2003 issued by Travelers Tavern LLC for the beneficiary and for Travelers Tavern LLC's other employees. Travelers Tavern LLC is listed with an address which matches that of the petitioner and which also matches the address of the employer and of the proposed job location on the Form ETA-750. As noted earlier, the director specifically pointed out that the IRS tax number for the petitioner is not listed on the Form I-140, and the petitioner has not otherwise established whether the entity

[7] The director indicated in the March 3, 2005 decision to deny that the annual proffered wage in this matter is $54,000. However, the Form ETA-750 as certified states that the proffered wage is, in fact, $50,000 annually.

that issued the Forms 1099-MISC and Forms W-2 in the record is the same as the petitioner. Thus, these wage and tax statements may not be used to demonstrate an ability to pay the wage.

For illustrative purposes only, if the petitioner were able to demonstrate that Travelers Tavern LLC and the petitioner are the same legal entity, the Forms 1099-MISC for 2001 and 2002 and the Form W-2 for 2003 would show compensation paid the beneficiary by the petitioner, as listed in the table below.

| Year | Beneficiary's actual compensation | Proffered wage | Wage increase needed to pay the proffered wage. |
|---|---|---|---|
| 2001 | $42,000.00 | $50,000.00 | $8,000.00 |
| 2002 | $20,000.00 | $50,000.00 | $30,000.00 |
| 2003 | $47,769.16 | $50,000.00 | $2,230.84 |

The petitioner has not established its ability to pay the proffered wage in 2001, 2002 or 2003 through actual wages paid the beneficiary.

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 (9th 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.,* 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

As discussed earlier, the director requested the petitioner's complete, signed tax returns and it failed to provide them. The director advised the petitioner that he would not consider unsigned tax returns as final and complete, and as such would not rely upon them when analyzing the petitioner's ability to pay the wage. In the director's decision, the director specifically informed the petitioner that one basis of his denial was the petitioner's failure to provide this requested evidence.

The petitioner has not provided its complete, signed tax returns on appeal. The AAO will not rely on tax returns that are not complete and signed. *See* 8 C.F.R. § 103.2(b)(14).

This office would also note that even if it could rely on the tax returns submitted, the petitioner did not submit evidence to establish that Traveler's Tavern, Inc. J. Patrick is the same legal entity as the petitioner, as was noted by the director. Thus, even if these tax returns were signed, the petitioner has not established that the information on the tax returns in the record relate to the petitioner.

In sum, the petitioner has failed to provide its final, signed tax returns. It also has failed to establish that it is the same legal entity as that listed on the tax returns, the wage statements and the miscellaneous income statements in the record, or even that it has an IRS tax identification number. The petitioner has not provided

any reliable evidence of its ability to pay the proffered wage. The petitioner has failed to establish that it has had the ability to pay the beneficiary the full proffered wage from the priority date onwards.

Regarding the director's finding that the petitioner failed to show that the beneficiary had the necessary two years qualifying experience, 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).

The Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the proffered position of chef. In this case, item 14 describes the requirements of the proffered position as follows:

| 14. | Education | |
|---|---|---|
| | Grade School | 8 years |
| | High School | none required |
| | College | none required |
| | College Degree Required | not applicable |
| | Major Field of Study | not applicable |

The applicant must also have two years of experience as a cook or in the job offered, the duties of which 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 reflects the following special requirements: if the beneficiary's two years of experience are as a cook then that experience must include cooking Irish specialties. The beneficiary must also have a Sanitation Certification from a Restaurant Association or a City of Chicago Certificate in Sanitation.

The beneficiary set forth his credentials on the Form ETA-750B and signed his name on August 21, 2002 under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part 15, eliciting information of the beneficiary's work experience, he indicated that he worked full-time for the petitioner in the position of Executive Chef/Irish cuisine from June 2000 until the date that he signed the Form ETA-750. He also represented that from September 1989 through September 1991, he worked as a cook at Manse Restaurant in Belfast, Ireland. The beneficiary does not provide any additional information concerning any employment background on that form which provides experience that is relevant to the proffered position, namely, experience as a cook or chef.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (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.

First, the petitioner's two statements in the record which relate to the beneficiary's past employment with the petitioner, dated October 17, 2002 and June 27, 2003, respectively, indicate that as of the priority date, the beneficiary had worked full-time for the petitioner in the proffered position for only nine to ten months. Thus, as stated by the director in his decision, the petitioner may not claim that the beneficiary had acquired two years of experience in the proffered position while employed by the petitioner as of the priority date.

The undated letter from Manse Restaurant which was filed with the petition states that the beneficiary worked as a trainee chef during July 1989 through October 1991. In the RFE, the director informed the petitioner that training could not satisfy the work experience requirements set forth on the Form ETA-750. In response to the RFE, the petitioner provided the September 23, 2004 letter from Manse Restaurant on which the manageress of that restaurant modified the statements made on the original letter and suggested that the position of trainee chef is the same position as that of cook. She stated that the beneficiary worked for Manse Restaurant from July 1989 through October 1991, where he prepared and cooked authentic Irish cuisine, and that under the supervision and direction of executive chefs, he created recipes, prepared stews and ordered food supplies for inventory. In the brief filed in response to the RFE, counsel suggested that the position of trainee chef was equivalent to the position of sous chef *and* the position of cook. In the brief filed on appeal, counsel suggested that, in the alternative, according to the DOL's *Dictionary of Occupational Titles*, the position of trainee chef is equivalent to that of prep cook, which in turn is equivalent to that of cook.

The AAO notes that the DOL's *Dictionary of Occupational Titles* has not been updated since 1991, and that it has been replaced by DOL's O*NET (Occupational Network Database) online database. *See* http://www.onetcenter .org /faqGeneral.html#q6 (accessed May 1, 2008). The DOL's O*NET list of the duties of cook vary from those set out in the most updated edition of the *Dictionary of Occupational Titles* and may be found at http://online. onetcenter.org/link/summary/35-2014.00 (accessed April 24, 2008). The O*NET specifies that prior experience is generally not needed for the position of cook. The duties of the position of cook as listed at O*NET coincide with the duties performed by the beneficiary while employed by Manse Restaurant according to the September 23, 2004 employment letter in the record.

However, the following inconsistencies in the record lead this office to conclude that a preponderance of the evidence establishes that the Manse Restaurant employment letters in the record are not authentic. As such they are not relevant, probative evidence, and the petitioner has provided no other evidence to support its claim that the beneficiary has two years of qualifying experience.

A petition that fails to comply with the technical requirements of the law may be denied by the AAO on that basis even if the director does not identify such ground 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.)

First, the petitioner submitted two employment letters from Manse Restaurant, Duncairn Avenue, Belfast BT156BP.[8] An Internet search indicates that the correct postal code for this restaurant is: BT146BP. *See:*

[8] Note that this is the address information as represented on what is allegedly two different versions of the

http://www.foodeu.com/northern-ireland/restaurants-in-belfast/the-manse-restaurant/28387/ (accessed April 24, 2008). **Also, while the letters were allegedly written by the same individual:** [redacted] the two letters bear different signatures. The letters themselves are inconsistent in that the first letter describes the beneficiary's duties as that of trainee chef, and the second letter describes his duties at the restaurant as that of cook. In her brief, counsel asserted that the positions of trainee chef, sous chef and cook are in fact all three the same positions, apparently as an attempt to explain the discrepancies in the two restaurant employment letters in the record. However, information at the DOL's O*NET online database makes clear that the positions of sous chef and of cook involve different duties. *See* http: //online.onetcenter .org/link/summary/35-2014.00 and http://online.onetcenter.org/link/summary/35-1011.00 (accessed April 28, 2008)(which indicate that sous chefs must perform duties of greater responsibility than cooks, such as inspecting equipment to ensure conformance to established standards, instructing and supervising cooks and other kitchen workers, and ordering food and other supplies). Further, on the Form ETA-750B, the beneficiary stated that he worked at Manse Restaurant from September 1989 through September 1991. Yet, the Manse Restaurant employment letters each indicate that the beneficiary worked at this restaurant from July 1989 through October 1991.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Thus, the petitioner has not demonstrated that as of the priority date the beneficiary had two years of qualifying experience in the proffered position or as a cook which is required by the Form ETA-750 as certified.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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Manse Restaurant's formal, letterhead stationery.