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U. S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 10 2009

SRC 06 225 50765

In re: Petitioner:
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center ("director"), denied the immigrant visa petition. The petitioner appealed. The Administrative Appeals Office ("AAO") dismissed the appeal. The AAO reopened its decision sua sponte and issued a Notice of Intent to Deny. The reopened appeal will be dismissed.

The petitioner is a Mexican restaurant and seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's January 30, 2007 decision, the petition was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 16, 2001. The proffered wage as stated on Form ETA 750 is $25.00 per hour, based on a 40 hour work week, which is equivalent to $52,000 per year. The labor certification was approved on May 25, 2005, and the petitioner filed the I-140 on the beneficiary's behalf on July 18, 2006.[2] The petitioner listed the following information on the I-140 petition: date established: May 1, 1999; gross annual income: $369,000; net annual income: not listed; and current number of employees: 6.

On August 23, 2006, the director issued a Request for Evidence ("RFE"), for the petitioner to provide further evidence related to its ability to pay from 2001 onward, including either the petitioner's federal tax returns, audited financial statements or annual reports. The RFE also sought Forms W-2 issued to the beneficiary if employed, and Forms 941 to reflect quarterly wages paid. Additionally, the director requested that the petitioner submit evidence that the beneficiary had the required three years and ten months of prior experience to qualify for the position offered to include letters from prior employers along with corroborating evidence of employment such as original pay statements, earnings statements, and or tax returns. The petitioner responded. On January 30, 2007, the director denied the petition finding that the petitioner did not establish its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed to the AAO.

On January 22, 2009, the AAO dismissed the petitioner's appeal. Following consideration of the petitioner's tax returns, wages paid, net income, and net current assets, and additional information submitted on appeal, the AAO determined that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

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[2] The petitioner filed two prior I-140 petitions on behalf of the beneficiary. In its first petition, the petitioner sought to classify the beneficiary as an "alien of extraordinary ability" for the position of a chef. That petition was denied on August 28, 2001, as the petitioner failed to establish that the beneficiary met the criteria for this classification. The second I-140 petition that the petitioner filed on the beneficiary's behalf was denied on June 13, 2003 based on "abandonment" as the petitioner failed to respond to a Request for Evidence for the petitioner to submit an original Form ETA 750 in support of the petition. The petitioner had filed the second I-140 petition prior to obtaining the labor certification underlying the present I-140 petition.

On April 27, 2009, the AAO reopened the matter sua sponte and issued a Notice of Intent to Deny ("NOID"). The NOID allowed the petitioner to address and submit evidence related to the following issues: ability to pay; whether *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), would appropriately apply in the instant matter; whether the petitioner adequately documented that the beneficiary had the experience required for the position; whether the job offer was realistic; and whether the petitioner intended to employ the beneficiary in the position offered. The petitioner responded. We will address each of the foregoing points respectively.

First, we will address the basis for the petition's denial, the petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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, on the Form ETA 750B, signed by the beneficiary on July 25, 2005, the beneficiary represented that he has been employed with the petitioner from March 1992 to the present (date of signature).[3]

The petitioner submitted the following evidence of prior wage payment to the beneficiary:

Year	W-2 Wages Paid	Difference between wages paid and the proffered wage
2007	No W-2 or wage documentation submitted	$52,000.00
2006	No W-2 or wage documentation submitted	$52,000.00
2005	No W-2 or wage documentation submitted	$52,000.00
2004	No W-2 or wage documentation submitted	$52,000.00
2003	No W-2 or wage documentation submitted	$52,000.00
2002	No W-2 or wage documentation submitted	$52,000.00
2001	$17,450.00	$34,550.00

The following W-2 statements account for time before the priority date:

2000	$18,173.28
1997	$13,412.02

[3] On Form G-325A, Biographic Information, filed with the beneficiary's Form I-485 Application to Register Permanent Residence or Adjust Status, signed on May 22, 2006, the beneficiary represented that he was employed with the petitioner since 1995. The beneficiary stated on Form ETA 750 that he has been working for the petitioner since March 1992. However, the Form I-140 clearly states that the petitioner was formed in 1999. The reason for these differences is unclear.

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).

1992 $5,982.49[4]

The priority date is April 16, 2001, so that the wages paid prior to 2001 would not demonstrate the petitioner's ability to pay after that date, but will be given general consideration. The petitioner asserts that it currently employs and pays the beneficiary, however, the petitioner failed to submit any subsequent W-2 statements after 2001, and did not offer any explanation for the lack of subsequent W-2 statements. Specifically, counsel in his brief on appeal states that as of March 2007 the petitioner paid the beneficiary $17 an hour. However, the petitioner does not submit any documentation to support this claim, either with its appeal brief, or in response to the AAO's RFE. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). Additionally, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The amount that the petitioner paid the beneficiary in each year is less than the proffered wage. Therefore, the petitioner is unable to establish its ability to pay the beneficiary the proffered wage based on prior wage payment alone. The petitioner must establish that it can pay the difference between the proffered wage and the wages already paid in 2001 and the full proffered wage in subsequent years.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is

[4] The petitioner additionally submitted partial copies of paystubs for the dates prior to the April 2001 priority date. The partial pay statements reflect amounts paid ranging from $65 dollars to a high of $313. It is unclear whether these statements reflect weekly wages, or bi-monthly pay. The reason for the variance in pay is also unclear. As the pay is for the time period before the priority date, these wages do not need to be considered further.

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 USCIS, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is a C corporation. For a C corporation, USCIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

Tax year[5]	Net income or (loss)
2007	-$3,819
2006	not submitted
2005	-$3,595
2004	-$6,529
2003	$5,118
2002	-$5,627
2001	-$12,727
2000	$10,535

Based on the foregoing, the petitioner cannot establish its ability to pay the beneficiary the proffered wage in any of the foregoing years, even if we added the 2001 calendar W-2 wages to the 2001 tax year net income. However, the petitioner did not provide any regulatory prescribed evidence for the year 2006 to demonstrate its ability to pay the proffered wage in that year.[6] Additionally, we note that the petitioner's tax returns reflect declining net income from the year 2000 to 2007.

As an alternative means of determining the petitioner's ability to pay the proffered wages, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] Current assets include cash on hand, inventories,

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[5] The petitioner files its taxes based on a tax year rather than a calendar year. The petitioner's tax year runs from November 1 to October 31, so that the petitioner's 2000 federal tax return reflects the time period from November 1, 2000 to October 31, 2001, and would be relevant to analyzing ability to pay from April 2001 onward.

[6] The petitioner states in its letter that it submitted its 2006 federal tax return, however it was not attached to the filed response.

[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such

and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

Tax year	Net current assets
2007	no schedule L submitted
2006	no tax return submitted
2005	$6,723
2004	$6,485
2003	$10,006
2002	$7,780
2001	$7,416
2000	$16,378

The petitioner cannot demonstrate its ability to pay the proffered wage from its net current assets in any of the foregoing years, even if the wages paid to the beneficiary in 2001 were added to the petitioner's net current assets. Similarly, the petitioner's tax returns reflect an overall decline in net current assets between the years 2000 to 2005.

Additionally, the AAO notes the following information from the petitioner's tax returns:

Tax year	Gross Receipts	Salaries Paid	Officer's Compensation
2007	$320,576	$81,320	$26,200
2006	not submitted	not submitted	not submitted
2005	$323,323	$85,145	$28,500
2004	$326,996	$69,732	$42,400
2003	$348,280	$82,515	$37,075
2002	$352,252	$81,985	$57,200
2001	$379,623	$95,835	$67,750
2000	$424,228	$105,442	$46,800

On appeal, the petitioner had submitted a letter from its accountant, dated March 22, 2007, which cited to the business's status as a C corporation, and that it was, "very doubtful that it will ever show a profit . . . [and that] most likely any profits will be wiped out by additional salaries to the owner or members of the family." The accountant also asserted that depreciation might be considered, and that in his opinion, the business was "viable."

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accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. *See* Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, *available at* http://www.irs.gov/pub/irs-pdf/i4562.pdf, (accessed July 2, 2009). The depreciation argument has previously been addressed by courts.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989). Therefore, the accountant's assertion that depreciation should be considered in determining the petitioner's ability to pay will not be accepted.

The AAO requested that the petitioner submit additional evidence related to its ability to pay the proffered wage. Counsel asserts that the petitioner has established that it is facing difficult economic times, particularly in the Detroit metro area, and that such circumstances would warrant favorable consideration under *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

Matter of Sonegawa, 12 I&N Dec. at 612 relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period

of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

Here, counsel cites to U.S. Bureau of Labor Statistics for June 3, 2009, and asserts that the unemployment rate in the Detroit area has reached "an all time high of 14.6 percent." Counsel asserts that the petitioner remains in business based on its reputation. He asserts that the petitioner continues to pay a consistent amount in salaries and that the owner has reduced his compensation. Further, he asserts that the wage for a high level cook in the Detroit area is now $25,875 per year.

The AAO will address each point individually. With respect to the claim that the Detroit metro area is suffering high unemployment in 2009, this claim would fail to show how the business was negatively impacted for a short time period, in light of the petitioner's history of declining gross receipts from the year 2000 onward. Between 2000 and 2007, the petitioner's tax returns reflect a steady decline of over $100,000 even prior to the current recession and unemployment.[8]

Regarding the petitioner's reputation, counsel submits two articles placed in the local press. The articles were printed subsequent to the date that the AAO issued the RFE on April 27, 2009 in the instant matter requesting evidence of how the petitioner met the standard in *Sonegawa.* Both articles are the same; the second article reflects the same substance reprinted after issuance of the first article.

The first article is dated May 16, 2009 and appears at http://www.daily-jeff.com/news/article[redacted] which online is listed as located in Cambridge, Ohio, and not in Michigan. The article discusses the beneficiary's initial role as a dishwasher. The petitioner's owner states that the beneficiary, "came up with chunky beef," which he describes as a dish, "cook[ed] for two hours, add green peppers and onions. No powdered garlic – fresh garlic. It's delicious." The majority of the article discusses the petitioner's lawsuit against USCIS seeking to qualify the beneficiary for a skilled worker visa, rather than the beneficiary's cooking, or the petitioner's reputation in the area. The owner states his frustration with the process, "What the heck does the government want."[9] The only other comment related to the restaurant is from one customer that he did not need a menu to order, that he ordered, "Enchiladas – beef, cheese and onions," that the food was, "very authentic . . . you get in, get out and get back to work." The same article was reprinted at http://www.examiner.com/a-[redacted]

The article only contains the petitioner's statement regarding one dish the beneficiary makes, and fails to elaborate how this dish is significantly different from, or an innovation from standard Mexican

[8] Additionally, if the Detroit area suffers from such high unemployment, the issue is then whether the petitioner truly needs to hire a foreign worker. The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the Detroit metro area indeed suffers from unemployment at a rate of 14.6%, then it would seem likely that a U.S. worker would be available to fill the current position.

[9] Part of this frustration may be a result of the petitioner's initial misfiling, and the abandonment of its second petition.

cuisine, or that the chunky beef dish attracts regular customers and that the business has formed its reputation around the chunky beef dish or other innovative entrees. In fact, the only testimony from a customer is that he orders the standard enchiladas and appreciates the quick service. The majority of the article addresses points, which form the basis for the lawsuit. In light of the foregoing, we would not conclude that this article establishes the petitioner's reputation akin to the circumstances in *Sonegawa,* or that the petitioner could establish its ability to pay the beneficiary the proffered wage based on a totality of the circumstances.

Counsel asserts that the petitioner has paid a consistent amount in salaries to each worker. 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. Wages paid to the beneficiary were considered above, and in connection with the petitioner's net income and net current assets. The petitioner did not submit any documentation to establish the specific wages paid to the beneficiary since 2001, either in the form of W-2 statements, or paystubs. Additionally, the petitioner states on Form I-140 that it employs six workers. Whether that number includes the petitioner's owner in addition is unclear. If we examined the wages paid to each worker, taking the petitioner's highest year of wages paid: 2000, wages in the amount of $105,442, and divided that number by 5 (excluding the petitioner's owner), that would account for wages of $21,088.40 per worker, which is significantly less than the beneficiary's proffered wage of $52,000. Additionally, **in only two years did the officer's compensation exceed $52,000. In most years, officer** compensation was significantly less. The petitioner would have us believe that it intends to pay the beneficiary more than the corporate officer earns. The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one from the time 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).

Counsel next asserts that the wage for a high level cook in the Detroit area is now $25,875 per year and cites to a U.S. Department of Labor wage survey.

Counsel's argument is flawed. The petitioner filed Form ETA 750 for the position of a "chef" and not a "cook." The current level four wage[10] for a chef in the Wayne County, Detroit area, which

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[10] *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm, (accessed June 17, 2009).

Why did the prevailing wage two tier skill level structure change to four levels?

> Congress enacted the Consolidated Appropriations Act of 2005 amending the Immigration and Naturalization Act (Section 212(p), 8 U.S.C. 1182(p)) to provide: "Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an

includes the petitioner's location in Ecorse, Michigan, is $26.37 hour, or $54,850 year.[11] The position of chef has a "Job Zone" of Level Three:

> **JobZone Three: Medium Preparation Needed**
>
> **Experience:** Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam in order to perform the job.
>
> **Education:** Most occupations in this zone require training in vocational schools, on-the-job experience, or an associate's degree. Some may require a bachelor's degree.
>
> **Job Training:** Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers.
>
> **Examples:** These occupations usually involve using communication and organizational skills to coordinate, supervise, manage, or train others to accomplish goals. Examples include funeral directors, electricians, forest and conservation technicians, legal secretaries, interviewers, and insurance sales agents.
>
> **SVP Range:** 6.0 < 7.0

As the petitioner required three years and ten months of experience, which exceeds the category's allowed training, the position would likely be assigned the highest wage level.

Alternatively, the wage that counsel cites to is for a "cook" in the Detroit area.[12] A cook is encompassed within a different "Job Zone," Job Zone 2, and accordingly reflects a lower wage.

> existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the two levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level."

[11] *See* http://www.flcdatacenter.com/, the Foreign Labor Certification Data Center, Online Wage Library; specifically http://www.flcdatacenter.com/OesQuickResults.aspx?area=19804&code=35-1011.00&year=10&source=1, (accessed July 2, 2009).

[12] The level 4 wage for a cook in the Detroit area for the time period July 2008 to June 2009 was $25,875 annually. *See* http://www.flcdatacenter.com/OesQuickResults.aspx?area=19804&code=35-2014.00&year=9&source=1, (accessed July 2, 2009). The assessed level 4 wage for a cook in the Detroit area increased to $26,749 for the time period July 2009 to June 2010. *See* http://www.flcdatacenter.com/OesQuickResults.aspx?area=19804&code=35-2014.00&year=10&source=1, (accessed July 2, 2009).

JobZone Two: Some Preparation Needed

Experience: Some previous work-related skill, knowledge, or experience may be helpful in these occupations, but usually is not needed. For example, a teller might benefit from experience working with the public, but an inexperienced person could still learn to be an teller [sic] with little difficulty.

Education: These occupations usually require a high school diploma and may require some vocational training or job-related course work. In some cases, an associate's or bachelor's degree could be needed.

Job Training: Employees in these occupations need anywhere from a few months to one year of working with experienced employees.

Examples: These occupations often involve using your knowledge and skills to help others. Examples include sheet metal workers, forest fire fighters, customer service representatives, pharmacy technicians, salespersons (retail), and tellers.

SVP Range: 4.0 to < 6.0

Additionally, we note that the petitioner listed the wage of $25 per hour on Form ETA 750, and listed the position title as a chef. The petitioner also listed that the job required three years and ten months of experience. DOL did not require the petitioner to change, amend or increase the wage prior to certification. DOL also did not require the petitioner to change or amend either the job title, or the amount of experience required prior to certification. The petitioner cannot now assert that the position should be classified as a cook and not a chef, so that the petitioner can establish its ability to pay the proffered wage. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). If the petitioner wants to employ the beneficiary as a "cook" rather than a "chef" at the lower wage of $25,875, there is no bar to the employer filing a new labor certification for the different position at the lesser wage. However, related to the instant matter, the petitioner must pay the wage as stated and certified on Form ETA 750. USCIS must look to the job offer portion of the labor certification to determine the requirements for the position. USCIS 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 consideration of wages paid to the beneficiary, the petitioner's net income, net current assets, and the totality of the circumstances based on *Matter of Sonegawa,* 12 I&N Dec. 612, the petitioner has

not established its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

Next, we will address the additional issues raised in the AAO's NOID. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petitioner failed to adequately document that the beneficiary had the required three years and ten months of prior experience as a chef. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" position description provides:

> The duties and responsibilities included preparing specialized Mexican dishes including special enchilada sauces, special sauces for meats, meat pies and our regular signature dish green sauce ribs, teaching the cooks to prepare Mexican recipes, developing new Mexican dishes for the menu and co-ordinating [sic] with the staff on serving suggestions.

The job offered listed that the position required prior experience of: three years and ten months in the job offered, chef. The petitioner did not list that an individual could qualify for the position through experience in any alternate related occupations, or list any other special requirements.

On the Form ETA 750B, the beneficiary represented his relevant experience as: (1) La Cabana del Pescador, Ocotlon, Jalisco, Mexico, from August 1983 to March 1988, position, chef; and (2) the petitioner, March 1992 to the present (date of signature July 25, 2005), as chef.

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

> (ii) *Other documentation*—

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted the following letter:

> Letter from [redacted], La Cabana del Pescador, June 4, 2003;
> Position title: unstated;
> Dates of employment: August 1983 to March 1988;
> Description of duties: "he worked in the kitchen area providing support in activities related to this department as a cook, we acknowledge his interest and enthusiasm, as well as the responsible manner in which he behaved."

In response to the director's RFE, the petitioner submitted a second letter:

> Letter from [redacted] La Cabana de Yeyo S.A. de C.V., undated;
> Position title: unstated;
> Dates of employment: August 1983 to March 1988;
> Description of duties: "he worked in the kitchen area providing support in activities related to this department as a cook, preparing entrees, salads and all of the specialties of the house. We acknowledge his interest and enthusiasm, as well as the responsible manner in which he behaved." She continues, "his pay was in cash during said period and there is no evidence that we have to send to the government."

The first letter fails to provide sufficient specificity regarding the beneficiary's training and experience received. The second letter, signed by [redacted] failed to indicate whether the beneficiary's experience was on a full-time or a part-time basis. From the letters, it is unclear whether the beneficiary was employed full-time as a cook, or whether he performed duties to assist other cooks. Neither of the letters state that the beneficiary had three years and ten months of experience in "preparing specialized Mexican dishes including special enchilada sauces, special sauces for meats, meat pies and our regular signature dish green sauce ribs," or in "teaching the cooks to prepare Mexican recipes, developing new Mexican dishes for the menu and co-ordinating [sic] with the staff on serving suggestions." The second letter only references preparation of salads and unspecified "specialties of the house."

In response to the AAO's NOID, the petitioner submitted the following:

> Letter from [redacted] La Cabana de Yeyo S.A. de C.V., dated May 29, 2009;
> Position title: full-time cook;
> Dates of employment: August 1983 to March 1988;
> Description of duties: "he worked in the kitchen area providing support in activities related to this Department as a cook, preparing entrees, salads and all of the specialties of the house. We acknowledge his interest and enthusiasm, as well as the responsible manner in which he behaved." Further, "Shortly [the beneficiary] invented his own culinary recipes that we used in our restaurant." The letter reiterates, "his payments were in cash during that period and there is no evidence that we have to send to the government."
>
> does explain the name change between the first letter issued and the second letter: "Our restaurant was called "La Cabana del pescador" but due to the death of my husband [redacted] we changed the restaurant's name to La Cabana De Yeyo, S.A. De C.V."

While this letter provides some additional detail, the letter does not reflect that the beneficiary has three years and ten months of experience in the specific position offered as a chef or that he has experience in "preparing specialized Mexican dishes including special enchilada sauces, special sauces for meats, meat pies and our regular signature dish green sauce ribs," or in "teaching the cooks to prepare Mexican recipes, developing new Mexican dishes for the menu and co-ordinating [sic] with the staff on serving suggestions." The third letter does not address what "culinary recipes" the beneficiary developed, how many recipes, or state any information related to the invented recipes. None of the letters designate the food type prepared, and whether it was Mexican food as the specific position petitioned for requires. The labor certification did not designate that the beneficiary could qualify for the position based on any other related occupation such as, "cook, food preparer, or any related restaurant position."

The letter from [redacted] emphasizes the beneficiary's experience as a cook. However, we note that DOL's Dictionary of Occupational Titles ("DOT"), now encompassed by O*NET, which DOL used at the time of filing the instant labor certification to determine skill levels required for occupations, distinguishes between the position of a chef and a cook.

A chef is defined in the DOT as:

> **CHEF** (hotel & rest.) alternate titles: cook, chief; kitchen chef
>
> Supervises, coordinates, and participates in activities of cooks and other kitchen personnel engaged in preparing and cooking foods in hotel, restaurant, cafeteria, or other establishment: Estimates food consumption, and requisitions or purchases foodstuffs. Receives and examines foodstuffs and supplies to ensure quality and

quantity meet established standards and specifications. Selects and develops recipes based on type of food to be prepared and applying personal knowledge and experience in food preparation. Supervises personnel engaged in preparing, cooking, and serving meats, sauces, vegetables, soups, and other foods. Cooks or otherwise prepares food according to recipe [COOK (hotel & rest.) 313.361-014]. Cuts, trims, and bones meats and poultry for cooking. Portions cooked foods, or gives instructions to workers as to size of portions and methods of garnishing. Carves meats. May employ, train, and discharge workers. May maintain time and payroll records. May plan menus. May supervise kitchen staff, plan menus, purchase foodstuffs, and not prepare and cook foods [EXECUTIVE CHEF (hotel & rest.) 187.167-010]. May be designated according to cuisine specialty as Chef, French (hotel & rest.); Chef, German (hotel & rest.); Chef, Italian (hotel & rest.); or according to food specialty as Chef, Broiler Or Fry (hotel & rest.); Chef, Saucier (hotel & rest.). May supervise worker preparing food for banquet and be designated Banquet Chef (hotel & rest.).

ONET CROSSWALK: 61099A Chefs and Head Cooks

A cook is defined in the DOT as:

COOK (hotel & rest.) alternate titles: cook, restaurant

Prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.);

> Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital.
>
> ONET CROSSWALK: 65026 Cooks, Restaurant

Similarly, in the revised O*NET, chefs are defined differently then cooks. Generally, a chef, or a head cook has more responsibility for supervising, and coordinating the work of other cooks. A chef may also train other workers, and instruct other workers on the proper preparation of menu items, whereas both the DOT and ONET distinguish that a cook is more generally involved in the actual preparation and cooking activities. Accordingly, as the positions require different skills, the petitioner would need to document that the beneficiary has the required prior experience in the position offered as a chef, and not as a cook.

In response to the AAO's NOID, counsel asserts that the beneficiary does have the required three years and ten months of experience as evidenced from the letters addressed above, and that this evidence alone would be sufficient. Counsel states that a manager, "who was not fully aware of all the duties and responsibilities of the beneficiary" signed the second letter and "just provided general information and employment dates based on their human resource records."

The letters do not demonstrate that the beneficiary has three years and ten months of experience in the position offered as a chef. Further, the director in her RFE had requested corroboration of the beneficiary's experience set forth in the initial letter, and in response the prior employer stated that, "his pay was in cash during said period and there is no evidence that we have to send to the government." We note that none of the employers' "human resource records" were submitted to corroborate the beneficiary's employment.

While the petitioner did submit prior W-2 statements for the beneficiary, the petitioner has not stated for what time period it employed the beneficiary, or that the beneficiary worked on a full-time basis for the petitioner as a chef. One letter that the petitioner signed, dated April 11, 2002, indicated that the beneficiary "supervises and manages" the business, and not that he is, or was employed as a full-time chef. Additionally, counsel in response to the AAO's NOID specifically states that, "The fact that W-2's submitted for the Beneficiary were submitted to demonstrate that the Beneficiary has worked for the employer for several years but they were not submitted to show that the Beneficiary was employed as a full time cook." Counsel asserts instead that the W-2s from 1992, 1997 and 2000 were submitted to establish that the beneficiary had continuous presence in the U.S. for purposes of adjusting status to lawful permanent resident. The petitioner does not state clearly in any signed letter in the record for what period that the petitioner has employed the beneficiary, if any, in the proffered position as a chef.

Based on the foregoing, the petitioner has failed to establish that the beneficiary has the required three years and ten months of experience in the position offered.

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

The petitioner indicated that it will pay the beneficiary $52,000 as a chef. The petitioner's tax returns, and the beneficiary's W-2 statements submitted do not evidence that a $52,000 salary for a chef is a realistic job offer. The W-2 statements submitted show that the petitioner has paid the beneficiary the following amounts: 1992: $5,982; 1997: $13,412; 2000: $18,173; and 2001: $17,450.[13] Additionally, the petitioner's 2004 Form 1120S lists that it paid total salaries to all employees in the amount of $69,732. The beneficiary's wage would total almost the entire amount in salaries paid to all employees. Further, the petitioner's tax returns reflect the following amounts in officer's compensation: 2007: $26,200; 2006: return not submitted; 2005: $28,500; 2004: $42,400; 2003: $37,075; 2002: $57,200; 2001: $67,750; and 2000: $46,800. The beneficiary's offered wage would substantially exceed the paid officer's compensation in all but two years.

Counsel states in response to this point, as noted above, that the W-2 statements were submitted only to evidence the beneficiary's continuous presence in the U.S., not that these wages represent his full-time employment as a cook. Elsewhere in his brief, counsel argues that the wage of a cook in Detroit is now lower, and would be $25,875. This point has been addressed above. If the petitioner thinks the wage is in error, the petitioner can seek a new labor certification for the differing position of a cook, as opposed to the current position of a chef. None of these points, however, address that the petitioner's offer to pay the beneficiary $52,000 as a chef is a realistic job offer. The petitioner has failed to establish this point.

The last point to be addressed is that the petitioner must employ the beneficiary in the position offered. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2).

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[13] As noted above, the petitioner did not submit any W-2 statements subsequent to 2001, and did not address why it was unable to do so despite the director's Request for Evidence seeking such documentation. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner's letter dated April 11, 2002, indicated that the beneficiary "supervises and manages" the business, and not that he is, or was employed as a full-time cook. The petitioner's labor certification does not indicate that the beneficiary will perform extensive managerial duties, or that he will supervise any employees.

In response to the AAO's RFE, the petitioner submitted a letter signed by the owner, which states, "I [the owner] confirm that I will employ [the beneficiary] as a full time chef in our restaurant. It is not my intention for the beneficiary to supervise and manage the business; that is what I do as the owner." He continues, "the letter dated April 11, 2002 simply referred to other duties that he assists me with during certain times when I am not available. [The beneficiary] is not being offered the position of supervisor or manager. He is being offered the position of full time chef."

Additionally, counsel in his brief states that the beneficiary is not required to work in the position offered until he has attained permanent residence status. Accordingly, the prior letter would reflect the beneficiary's duties as of April 11, 2002, and not the position that the petitioner intends to employ the beneficiary in.

Specifically, the April 11, 2002 letter signed by the petitioner's owner states related to the beneficiary, "He is our best employee . . . He supervises and manages our business, he is also a Kitchen Chef with specialties Mexican Foods [sic] and various International Dishes."

While counsel's statement is correct that the beneficiary does not need to be employed in the position offered until he attains permanent residence status, the April 11, 2002 letter in combination with the beneficiary's higher salary raises doubts that the beneficiary's role will be solely as a chef, the position certified in the labor certification. 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). 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. *Id.* at 592. Alternatively, the higher salary coupled with low overall wages and inconsistent information regarding supervisory duties would make the position offered appear unrealistic.

Accordingly, 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.