

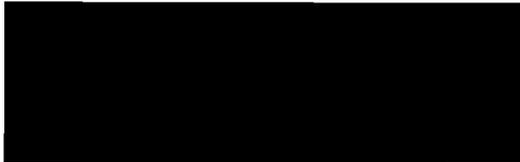


U.S. Citizenship
and Immigration
Services

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FILE:



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Office: NEBRASKA SERVICE CENTER

Date:

FEB 02 2010

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's July 6, 2007 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$24.04 per hour (\$50,003 per year). The Form ETA 750 states that the position requires two years of experience in the position offered.

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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1991 and to currently employ 22 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on December 20, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner did not claim to have employed the beneficiary during the relevant time period.

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

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).

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 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 USCIS should have considered income before expenses were paid rather than net income.

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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).²

² Counsel makes a similar argument on appeal: that deductions for depreciation and amortization should not be actually deducted from the petitioner's income and the amounts should be added back

The record before the director closed on June 21, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence.

- In 2001, the Form 1120S stated net income (loss)³ of -\$2,545.
- In 2002, the Form 1120S stated net income (loss) of -\$57,892.
- In 2003, the Form 1120S stated net income (loss) of -\$29,528.
- In 2004, the Form 1120S stated net income (loss) of -\$407.⁴
- In 2005, the Form 1120S stated net income of \$613.
- In 2006, the Form 1120S stated net income of \$1,107.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage in any of the relevant years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown

into the petitioner's actual income. The courts in *River Street Donuts* and *Chi-Feng Chang* rejected this sort of argument and we shall do the same.

³ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 3, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for all of the years at issue, the petitioner's net income is found on Schedule K of its tax returns.

⁴ The director held that the petitioner established its ability to pay the proffered wage in 2004. We presume that the director relied upon the figure appearing on line 21 of page one of the IRS Form 1120S instead of examining the figure that appears on Schedule K and reflects the petitioner's appropriate net income for 2004.

⁵ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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

- In 2001, the Form 1120S stated net current assets of \$24,754.
- In 2002, the Form 1120S stated net current assets of \$28,493.
- In 2003, the Form 1120S stated net current assets of \$1,250.
- In 2004, the Form 1120S stated net current assets of \$559.
- In 2005, the Form 1120S stated net current assets (liabilities) of -\$8,347.
- In 2006, the Form 1120S stated net current assets of \$12,423.

Therefore, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage in any of the relevant years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. Additionally, USCIS electronic records show that the petitioner filed one other Form I-140 petition, which has been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiary of that petition. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner or to other beneficiaries for whom the petitioner might wish to submit Form I-140 petitions.

The petitioner submitted copies of its bank statements covering 2001, June 2002 through July 2003, 2005, and 2006. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third,

no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L considered in determining the petitioner's net current assets.

On appeal, counsel argues that the director erred in refusing to consider the petitioner's bank statements and cites an Interoffice Memo from William Yates dated May 4, 2004.⁶ We first note that this memo was rescinded by a memo dated May 14, 2005 from William Yates. Secondly, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely is offered as guidance. Where the documentation submitted pursuant to 8 C.F.R. § 204.5(g)(2) is sufficient to render a decision, the director need not consider additional information. Lastly, the AAO's analysis complied with policy set forth by William R. Yates, Associate Director of Operations of USCIS, whose internal memorandum dated May 14, 2005 offering guidance on adjudications of petitioning entities' continuing ability to pay the proffered wage through the following three-tiered analysis:

Adjudicators should make a positive ability to pay determination on an I-140 under the following circumstances:

- The petitioner's net income is equal to or greater than the proffered wage;
- The petitioner's net current assets are equal to or greater than the proffered wage; or
- The employer submits credible, verifiable evidence that the petitioner is both employing the beneficiary and has paid or is currently paying the proffered wage.

The memorandum then states the acceptance of any other type of financial information is discretionary on the part of the adjudicator. The burden is on the petitioner to show that the financial information pursuant to 8 C.F.R. § 204.5(g)(2) is insufficient to demonstrate the petitioner's true financial situation. The petitioner presented no such evidence here and following the above analysis, failed to demonstrate that it had sufficient net income, net current assets, or paid the beneficiary the proffered wage.

Counsel states that a Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that the entire financial circumstances of the petitioner should be considered including the financial standing of the major shareholder⁷ who had pledged to continue funding the corporation. Counsel does not state how DOL precedent is binding in these proceedings.

⁶ The May 4, 2004 memo concerns requests for evidence.

⁷ The petitioner's tax returns do not identify both of the two shareholders designated on Form 1120S, page 1, G, or how much income each received in each year.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel argues that the petitioner's net income as reflected on its tax returns does not "accurately reflect [its] ability to pay since it is the goal . . . to reduce tax liability by obtaining as many credits and deductions it may legitimately have available[.]" The petitioner also submitted two letters concerning its financial situation. The first letter is from [REDACTED] professor of Accounting and Operations at the New York University School of Business. [REDACTED] states that the petitioner is able to pay the proffered wage because of its ability to divert funds away from compensation of the shareholder, reflected on the tax returns as officer compensation, to meet its other financial obligations including the beneficiary's salary. We first note that [REDACTED] does not state that he has audited the petitioner's financial records but instead he relied upon documents supplied by the petitioner (specifically, he stated he relied on "letters referencing the financial information of the company." Whether [REDACTED] examined the petitioner's entire tax returns is unclear.). The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. A compilation such as that relied upon by [REDACTED] is the management's representation of its financial position. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The other letter submitted, from [REDACTED] and the petitioner's financial representative, agreed with [REDACTED] that payments to the shareholders could be diverted to meet the petitioner's obligation to pay the proffered wage. She states that the petitioner "deducts on its tax return certain distributions to its shareholders as salary, which is available to the [petitioner] for the reduction of tax liability, which would underestimate the true funds available to the [petitioner] for its operational use."

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return.

The petitioner's 2001 through 2003 and 2006 tax returns fail to list the shareholders or the percentage owned. The 2004 and 2005 tax returns list one person as the 50% shareholder. Form 1120S, p.1, G identifies on the 2001 through 2006 tax returns that the petitioner has two shareholders. However, the record only contains one Schedule K-1 in 2004 and 2005, identifying one 50% shareholder, but not the second shareholder. The letter from [REDACTED] indicates that one individual holds 100% of the petitioner's stock, however, no supporting documentation was submitted.⁸ It is incumbent upon the petitioner to resolve any inconsistencies in the record by

⁸ Counsel also refers to "shareholders" plural in the appellate brief.

independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Forms 1120S in the record do not include Schedule E (Compensation of Officers), the form by which we may determine the amount paid to the shareholders. In addition, the petitioner did not submit W-2 Forms for the shareholders to evidence amounts paid. Without such evidence, the statements of [REDACTED] and [REDACTED] are unsupported. 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)).⁹

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. Instead, the petitioner demonstrated consistent loss or minimal net income and its net current assets were also consistently low. The petitioner must also show that it has the ability to pay the second sponsored worker. Thus, assessing the totality of the circumstances in this individual case, it is

⁹ We also note that the figures provided by [REDACTED] do not demonstrate that the petitioner was able to pay the proffered wage in 2002 as she represented that the petitioner had \$48,893 available, which is less than the proffered \$50,003. Additionally, the petitioner's 2001 and 2002 tax returns reflect officer compensation of \$29,850 and \$20,400, respectively, which is less than the proffered wage.

concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Additionally, the petitioner failed to adequately document that the beneficiary has the required experience for the position offered. 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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.

(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.

The regulations for the skilled worker classification contain a minimum requirement that the position of two years training or experience. The ETA Form 750 requires two years of experience in the job offered and does not allow for experience in any related occupation. The petitioner submitted two letters regarding the beneficiary's experience. The first letter, from [REDACTED], states that the beneficiary worked as a manager from 1987 to December 31, 1990. This letter does not contain the month that the beneficiary began employment with [REDACTED] does it state whether the beneficiary was employed in a full-time or part-time capacity, and does not state the description of his employment and job duties. In addition, it is unclear whether the letter is signed by a representative of the restaurant as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). The second letter, from the manager of [REDACTED] states that the beneficiary worked as a cook from 1990 to December 31, 1993. This letter does not provide any relevant information about the beneficiary's experience as a restaurant manager as it states that the beneficiary worked as a cook, which is not the job being offered. The beneficiary may not qualify based on experience in an alternate occupation. As a result, we are unable to conclude that the beneficiary had the requisite experience in the job offered at the time that the labor certification was filed.

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.