U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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MAR 30 2010

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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IN RE: Petitioner: [redacted]
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:

[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).

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 cook-Italian style. 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 determined that the petitioner had not established that the beneficiary possessed the required two years of work experience as of the priority date and denied the petition accordingly.

On appeal, former counsel submits additional evidence and contends that the petitioner has demonstrated that the beneficiary has the required experience.

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).

For the reasons explained below, the AAO concurs with the director's decision to deny the petition based on the petitioner's failure to establish that the beneficiary possessed the requisite work experience as of the priority date of the petition. Beyond the decision of the director, the AAO further finds that the petitioner failed to demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date.

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(l)(3) further 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.

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

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

The petitioner must demonstrate that the beneficiary has the necessary education and experience beginning on the priority date, the date the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that it has had the continuing ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977); 8 C.F.R. § 204.5(g)(2). Here, the Form ETA 750 was accepted for processing on April 5, 2001.[1] Item 14 of the ETA 750 also requires that the beneficiary must have two years of experience in the job offered as a cook-Italian style. Item 12 states that the proffered wage is $18.89 per hour, which amounts to $39,291.20 per year.

The visa preference petition was filed on January 9, 2007. Part 5 of the petition indicates that the petitioning business was established on March 11, 1996, claims a gross annual income of $1, 200, 000 and currently employs seven workers.

Part B of the Form ETA 750, signed by the beneficiary on January 16, 2001, instructs the beneficiary to list all jobs held during the past three years as well as any other experience that would qualify the beneficiary for the certified job opportunity. The beneficiary made two entries:

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[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

1) From May 1998 to the present, the beneficiary describes his work as "Odd Jobs." He states that they are "[j]obs resulting from chance meetings with friends who knew of some person needing help with some cooking or even jobs around their homes or offices."

2) From February 1996 to April 1998, the beneficiary states that he was employed by [redacted] at [redacted] NY 10013 as a cook-Italian style at the rate of 35 hours per week and that his duties included cooking using prescribed methods and recipes to prepare Italian specialties.

It is noted that on the G-325A biographic form signed by the beneficiary on November 30, 2007 and submitted in support of his application for permanent residency, he was instructed to list all employment for the last five years. The only entry made is for "odd jobs" from May 1998 to the present. In a space given to list the last occupation abroad, the entry made is "S/E cook." The date given for this employment is from 1985 to May 1994. This relevant experience was not listed on Form ETA 750.[2] There is no claim on either the ETA 750 B or the G-325A that the beneficiary has worked for the petitioner, despite the petitioner's pay stubs that it submitted for the beneficiary in 2007.

In support of the beneficiary's qualifying employment, the petitioner initially submitted a letter, dated January 15, 2001, from [redacted] as president of [redacted]. He states that the beneficiary worked for the restaurant for "two years and three months where he has experienced how to prepare special Italian dishes." No dates of employment were stated and there was no designation that the employment was full-time or part-time.

The director issued a request for evidence on June 19, 2007, requesting additional evidence related to the petitioner's ability to pay the proffered wage including evidence of any employment or payment of wages to the beneficiary. The director also requested that the petitioner submit additional verification from [redacted] that verifies the beneficiary's employment with more specificity as to the number of hours worked and copies of the documentation that [redacted] referenced in 2001 to verify the beneficiary's employment several years earlier or explain how [redacted] was able to recall employment for "two years and three months" without referring to such documentation. If W-2s or Form 1099s were issued to the beneficiary for employment at [redacted], the petitioner was requested to submit them.

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[2] *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

In response, the petitioner provided a second letter, dated July 28, 2007, from [redacted] Mr. [redacted] states that the beneficiary worked for the restaurant as a full-time, cook-Italian style, from February 1996 to April 1998.

In denying the petition, the director noted the receipt of the letter from [redacted] but found that the petitioner had failed to corroborate such claims of employment because no explanation was offered as to how either [redacted] or [redacted] was able to ascertain such specific dates of employment many years earlier without referencing specific documentation or providing copies of W-2s or Form 1099s as requested. Standing alone, the director declined to accept these letters as probative evidence of the beneficiary's claim to possess two years of full-time employment as a cook-Italian style as of the priority date of April 5, 2001.

On appeal, current counsel submits a new employment verification letter in support of the claim that the beneficiary acquired the requisite two years of employment experience as of the priority date. The letter is from the Sheraton Hotel in Guayaquil Ecuador. However it is in Spanish and is unaccompanied by a certified English translation in conformance with the regulation at 8 C.F.R. § 103.2(b)(3), which provides:

> T*ranslations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Moreover, as noted above, this employment was omitted from Part B of the ETA 750. It may not be considered probative of the beneficiary's qualifying experience. The petitioner has not demonstrated that the beneficiary has the necessary experience specified on the labor certification as of the priority date. As noted by the director, requesting the petitioner to provide an explanation and additional corroboration of the beneficiary's claimed employment at the Positano Ristorante was a material line of inquiry into the underlying accuracy of such claims. The petitioner failed to respond with any explanation or corroboration of such employment. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Additionally, for the reasons noted above, the letter from the Sheraton Hotel is not sufficient evidence of the beneficiary's qualifying employment. 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. 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, 591-592 (BIA 1988). We find that the record does not resolve the inconsistencies noted above and does not sufficiently support the petitioner's claim that the beneficiary has two full-time years of employment in the job offered.

As noted above, beyond the decision of the director, the petitioner failed to establish its ability to pay the proffered wage. In support of its continuing financial ability to pay the certified wage $39,291.20 per year, the petitioner provided copies of its 2002, 2003, 2004, 2005, and 2006 federal tax returns. The petitioner additionally provided a copy of an IRS transcript of its 2001 tax return.[3] The tax returns in 2001, 2002, 2003 and 2004 were filed using Form 1120, U.S. Corporation Income Tax Return. The 2005 and 2006 federal tax returns were filed on Form(s) 1120S, U.S. Income Tax Return for an S Corporation. The tax returns reflect that the petitioner was initially structured as a C corporation and elected an S structure on April 1, 2005.[4] They reflect that the petitioner's fiscal year ran from April 1st to March 31st of the following year as shown on the tax returns for 2001, 2002, 2003 and 2004. On the 2005 and 2006 tax returns the petitioner used a standard calendar year. The tax returns contain the following information:

Year	2001	2002	2003	2004
Net Income	-$ 2,754	$ 968	-$8,468	-$30,786

[3]Net income for this year is taken from the IRS transcript. Net current assets is calculated from the beginning of the year amounts shown on Schedule L of the 2002 tax return because they are not clearly reflected on the 2001 IRS transcript.

[4] For a C corporation, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

In an S corporation as shown on Form 1120S, where 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. 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 17e (2005) or on line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, net income is reflected on line 17e of Schedule K for 2005 and on line 18 of Schedule K for 2006.

Current Assets	$ 262,492	$429,421	$44,994	$24,892
Current Liabilities	$ 3,872	$ 3,597	$ -0-	$ 6,865
Net Current Assets	$ 258,620	$425,824	$44,994	$18,027

Year	2005	2006
Net Income	$ 1,955	-$17,362
Current Assets	$63,247	$26,530
Current Liabilities	$ 7,328	$62,801
Net Current Assets	$55,919	-$36,271

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[6]

It is noted that the petitioner provided copies of a payroll record running from a payroll period ending on July 1, 2007 to the payroll period ending on September 9, 2007. However, as noted above, the G-325A biographic form signed by the beneficiary on November 30, 2007 claimed no employment with the petitioner. Therefore, without additional explanation as to why this employment was omitted and corroboration of such earnings such as negotiated checks, these documents will not be considered as part of the determination of the petitioner's ability to pay the proffered wage. 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,

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[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.

[6] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

will not suffice. 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, at 591-592.

In determining a petitioner's ability to pay a proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as noted above, the current record does not sufficiently support that the petitioner has employed the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent 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 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 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* at 537 (emphasis added).

In this case, as set forth above, although the petitioner's net current assets of $258,620, $425,824, $44,994, and $55,919 were sufficient to cover the proffered wage of $39,291.20 in 2001, 2002, 2003, and 2005, and demonstrate the petitioner's ability to pay in these years, in 2004 and 2006, it has not established the ability to pay. In 2004, neither its -$30,786 in net income nor its net current assets of $18,027 was sufficient to cover the proffered wage, and in 2006, neither its -$17,362 in net income nor the -$36,271 in net current assets was sufficient to establish its ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.)[7]

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[7] *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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 *Sonegawa* was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere. In this case, the petitioner has consistently reported either losses or a very modest net income (2002). Although it has established its ability to pay in four of the years through its net current assets, except for 2001 and 2002, they did not

Based on a review of the evidence in the underlying record and the evidence and argument submitted on appeal, the petitioner has not established that the beneficiary possessed the requisite work experience as required by the labor certification. Further, the petitioner has not demonstrated that it has had the continuing financial ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).

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 at 1002 n. 9.

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.

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significantly exceed the proffered wage and declined to a negative amount along with net income in the last year reported (2006). It is not concluded that the petitioner established that such a framework of profitability existed in this case analogous to *Sonegawa* or that such unusual or unique circumstances prevailed here as in *Sonegawa.*