U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 0 2 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 summarily dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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.

On appeal, counsel[1] merely stated, "Petitioner has the financial ability to pay the proffered wage," and indicated that it was filing an appeal and would submit a brief and additional evidence to the AAO within thirty days. Counsel dated the appeal May 12, 2009. As of this date, more than 38 months later, the AAO has received nothing further, and the regulation requires that any brief shall be submitted directly to the AAO. 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii).

As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

Counsel here has not specifically addressed the reasons stated for denial and has not provided any additional evidence. The appeal must therefore be summarily dismissed. However, even if this appeal were not dismissed summarily, it would be dismissed substantively.

As set forth in the director's April 23, 2009 denial, an 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.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[2] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also

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[1] It is noted that the petitioner's representative listed on Form G-28 is currently inactive and is currently ineligible to practice law in California. *See* http://members.calbar.ca.gov/fal/Member/Detail/134793 (accessed July 17, 2012).

[2] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Here, the ETA Form 9089 was accepted on November 24, 2003.[3] The proffered wage as stated on the ETA Form 9089 is $12 per hour ($24,960 per year based on 40 hours per week). The ETA Form 9089 states that the position requires two years of experience in the job offered as a cook.

In the instant case, the petitioner submitted the beneficiary's Forms W-2 for 2003, 2006, 2007, and 2008. None of the Forms W-2 can be accepted as evidence that the petitioner paid the beneficiary any wages during any relevant time period.

The petition and the beneficiary's Form W-2 for 2007 do not list a Social Security Number (SSN). However, the beneficiary's pay stubs and Forms W-2 for 2003, 2006, and 2008 list a SSN that does not match the beneficiary's information. 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).

Further, the petitioner submitted two Forms W-2 for 2007. Form W-2 issued by employer stated wages of $18,640. Form W-2 issued by employer stated wages of $6,720. No evidence was submitted to explain the relationship, if any, between

In addition, the AAO notes that there are inconsistencies in the record. The petition and the sole proprietor's Forms 1040 list the petitioner's Employer Identification Number (EIN) of The EIN listed on ETA Form 9089 is The Forms W-2 submitted for the beneficiary indicate the following EINs:

- In 2003, Form W-2 lists an EIN of
- In 2006, Form W-2 lists an EIN of
- In 2007, Form W-2 lists an EIN of
- In 2007, Form W-2 lists an EIN of

[3] The ETA Form 9089 was certified with the filing date from a previously submitted Application for Alien Employment Certification (ETA 750). The previous SWA or local office case number is 184434 and was originally filed on November 24, 2003. The regulation at 20 C.F.R. § 656.17(d)(1) states in pertinent part:

> *Refiling procedures*. Employers that filed applications under the regulation in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date.

- In 2008, Form W-2 lists an EIN of

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).

As stated above, the EIN listed on the petition relates to a different entity than the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).[4]

The petitioner also submitted four of the beneficiary's pay stubs for 2009. Three of the paystubs covering the period from January 21st to March 3rd indicate an hourly rate of $12 an hour. The paystub covering the period from March 4th to March 17th indicates an hourly rate of $13 an hour.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the priority date.

In the instant case, the petitioner did not pay the beneficiary the full proffered wage each year, and the sole proprietor's adjusted gross income and net current assets were not equal to or greater than the proffered wage for all relevant years from the priority date in 2003 onward. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Beyond the decision of the director,[5] the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8

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[4] A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

[5] 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the 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'r 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as a cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook with from October 1, 1985 to August 30, 1994. The beneficiary also listed experience as a cook with the petitioner, in beginning on December 1, 2002 and continuing at least until the date the form was signed, on February 19, 2007. No other experience is listed.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The AAO notes that there are inconsistencies in the record. The record includes an undated letter from written by Manager. The address listed for the company is Further, the letter states that the beneficiary worked for the restaurant from June 1991 through May 1993 as a cook. The record also includes another letter from written by Manager, dated March 24, 2009. The letter states the beneficiary was employed as a cook from October 1, 1985 through August 30, 1994. The letter also states, "At that time the restaurant was known as No other evidence or explanation was submitted. The dates of employment in the letters do not match. The address of the company in the letters cannot be reconciled with the information the beneficiary listed on the labor certification. 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 (BIA 1988). If the beneficiary did gain experience with this employment was not listed on the labor certification. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. As this employment with was not listed on the labor certification, the beneficiary must submit independent and objective evidence to support this claimed qualifying experience.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

ORDER: The appeal is summarily dismissed.