

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

B1

FILE:

WAC 03 243 52295

Office: CALIFORNIA SERVICE CENTER

Date:

DEC 06 2006

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, who subsequently affirmed the decision to deny in response to a motion to reopen or reconsider, and the preference visa petition is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a private household. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as a domestic cook. As required by statute, the petition is accompanied by a Form ETA 750, application for Alien Employment Certification, approved by the U. S. Department of Labor.<sup>2</sup> 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, and, that the petitioner had not established that the beneficiary has the *requisite experience* as stated on the labor certification. The director denied the petition accordingly.

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

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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 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

<sup>1</sup> The beneficiary is also known as [REDACTED]

<sup>2</sup> The original labor certification is found in CIS file No. WAC 01 079 54649. Counsel submitted a copy of that original document with the subject petition. The original labor certification is now part of the record of proceeding.

processing by any office within the employment system of the U.S. Department of Labor. *See* 8C.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 U.S. Department of Labor 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 January 12, 1996.<sup>3</sup> The proffered wage as stated on the Form ETA 750 is \$12.38 per hour (\$25,750.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 1998, 1999, 2000, 2001 as well as documentation concerning the beneficiary's qualifications.

The petitioner submitted the following documents relative to the beneficiary's education, training and experience, and other requirements of the individual labor certification: a support letter from the petitioner dated April 24, 2003 offering a regular full time position as a domestic cook to the beneficiary; and, a letter dated February 19, 1996, with its English language translation from [REDACTED], Director of the Fomento Deportivo, Cuernavaca, Mexico stating that the beneficiary was employed as a cook (Mexican food) from January 1985 to January 1987.<sup>4</sup>

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the director requested on September 16, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, and, also, consistent with the regulation at 8 CFR § 204.5(l)(3)(ii) pertinent evidence of the beneficiary's the beneficiary has the requisite experience as stated on the labor certification petition.

Concerning the petitioner's ability to pay the proffered wage, the director requested the petitioner's U.S. federal tax returns for 1996 through 2003.<sup>5</sup> The director also requested the petitioner's family personal monthly expenses.

The director requested the beneficiary's W-2 Wage and Tax Statements for 1992 to 1994, and from 1995 to 2003, as well as the beneficiary's personal U.S. federal tax returns for the period 1992 to 1994.

---

<sup>3</sup> It has been approximately ten years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>4</sup> There is also a job reference letter dated January 29, 1991, found in the record of proceeding in the exhibits of a prior petition filed for the beneficiary by the petitioner.

<sup>5</sup> Also, if applicable, the director also requested annual reports for 2001 and 2002 with audited financial statements.

Concerning the director's request for pertinent evidence of the beneficiary's requisite experience as stated on the labor certification petition, the director requested evidence of the beneficiary's prior employment experience on letterform giving the dates of employment/experience giving the name, address, and title of the person providing the information with telephone numbers, and a description of the experience of the alien (the beneficiary's titles, duties, dates of employment/experience and numbers of hours worked per week).

Concerning the petitioner's ability to pay the proffered wage, in response to the request for evidence, counsel submitted copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 1997 1998, 1999, 2000, 2001, 2002 and 2003. Counsel indicated in the response that he had requested the 1996 federal tax return from the Internal Revenue Service (IRS). Counsel provided a statement of the petitioner's family personal monthly expenses. Counsel did not provide the beneficiary's W-2 Wage and Tax Statements for 1992 to 1994, and from 1995 to 2003, or, the beneficiary's personal U.S. federal tax returns for the period 1992 to 1994. Counsel stated that the tax returns were being prepared.

Concerning the director's request for pertinent evidence of the beneficiary's requisite experience as stated on the labor certification petition, counsel submitted the following documents: a letter from the petitioner dated November 4, 2004, stating that the beneficiary's duties in the petitioner's household, and, stating in pertinent part "... Due to a divorce in 2003 ... [the beneficiary] works partime/ [sic]on call approximately 16hrs per week @\$15.00 per hour;" and, a letter dated February 19, 1996, with its English language translation from [REDACTED], Director of the Fomento Deportivo, Cuernavaca, Mexico stating that the beneficiary was employed as a cook (Mexican food) from January 1985 to January 1987.

The director denied the petition on March 11, 2005, affirming the director's decision made in response to the petitioner's motion to reopen or reconsider on May 20, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, that the petitioner had not established that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, counsel asserts that with the submission of the petitioner's 1996 U.S. federal tax return transcript stating adjusted gross income of \$87,589.00, the petitioner evidenced her ability to pay the proffered wage. Also, counsel asserts that the funds the petitioner has in her bank account and brokerage account also evidence the ability to pay the proffered wage.

Counsel cites the case of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the proposition that in 2003 the petitioner had insufficient funds to pay the proffered wage (and meet her personal expenses), but since and because she had funds in her bank account, she had expectations to have the continued ability to pay the proffered wage.

Counsel has submitted the following copies of documents to accompany the appeal statement: the director's decision dated March 11, 2005; an explanatory letter dated April 6, 2005; the petitioner's bank statements for 2003 and 2004; the petitioner's brokerage account statements for August and September, 2003, and, September 2004; a letter from the petitioner dated April 24, 2003, offering the beneficiary a permanent job as a domestic cook; and, a translated letter from the beneficiary dated March 23, 2005, recounting her work experience in the cafeteria of the University of Cuernavaca located in Morelos, Mexico, from January 1985 to January 1987, and, from July 1987 to July 1988.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) 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. Evidence was submitted to show that the petitioner employed the beneficiary. However, no wage evidence was submitted other than the petitioner's statement that "... due to a divorce in 2003 ... [the beneficiary] works parttime/ [sic] on call approximately 16hrs per week @\$15.00 per hour." 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)).

The IRS tax transcript and tax returns submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$25,750.00 per year from the priority date of January 12, 1996:

- In 1996, the Form 1040 transcript stated adjusted gross income<sup>6</sup> of \$87,589.00.
- In 1997, the Form 1040 stated adjusted gross income of \$124,262.00.
- In 1998, the Form 1040 stated adjusted gross income of \$125,519.00.
- In 1999, the Form 1040 stated adjusted gross income of \$164,264.00.
- In 2000, the Form 1040 stated adjusted gross income of \$1,165,970.00.
- In 2001, the Form 1040 stated adjusted gross income of \$76,143.00.
- In 2002, the Form 1040 stated adjusted gross income of \$111,539.00.
- In 2003, the Form 1040 stated adjusted gross income of \$43,072.00.

The petitioner had sufficient adjusted gross income to pay the proffered wage in the years examined but for an examination of the petitioner's personal family expenses. However, the petitioner is a private household. Therefore, to determine the ability of the petitioner to pay the proffered wage, her living costs,<sup>7</sup> that is a statement of recurring household expenses for the petitioner's family must be considered. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

---

<sup>6</sup> IRS Form 1040, Line 32, 33 or 34 depending upon the year of the return.

<sup>7</sup> This statement should indicate all of the family's household living expenses. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

According to a statement of personal expenses dated November 4, 2004, the petitioner's monthly expenses are \$2,870.00 (\$34,440.00 calculated yearly). Adding the personal yearly expenses with the proffered wage, the total is \$60,190.00. In every year with the exception of 2003, the petitioner could have paid her personal expenses and the proffered wage from her declared adjusted gross incomes.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>8</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel, on appeal, states that in 2003 the petitioner had insufficient funds to pay the proffered wage (and meet her personal expenses) but because she had funds in her bank account, she had the ability to pay the proffered wage. According to the evidence submitted on appeal, the petitioner's bank statements for 2003 and 2004 for the 11 months for which statements were presented demonstrated that the petitioner maintained an average, approximate balance of \$94,723.64 for each month the account was maintained. The petitioner's brokerage account statements for August and September, 2003 stated a balance of \$135,773.28, and, the September 2004, account balance increased to \$161,481.63. Since the petitioner's shortfall in income for 2003 was only \$17,118.00, it is reasonable to conclude from all the evidence submitted, (including a record of seven years of adjusted gross incomes well above the threshold established by adding the proffered wage and personal yearly expenses) that the petitioner has established that she has the ability to pay the proffered wage.

A second issue to be discussed below is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is January 12, 1996: *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa. Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of domestic cook.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education .....	
	Grade School	<u>8</u>
	High School	<u>0</u>
	College	<u>0</u>
	College Degree Required	<u>Not Required</u>
	Major Field of Study	<u>Not Required</u>

<sup>8</sup> 8 C.F.R. § 204.5(g)(2).



Training	<u>Not Required</u>
Experience .....	
Job Offered - Years/Mos.	<u>2/0</u>
Related Occupation	<u>None</u>
Years/Mos.	<u>0/0</u>

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience for the position of domestic cook:

15. WORK EXPERIENCE

(a)

NAME AND ADDRESS OF EMPLOYER  
 Currently self-employed, working on a piece-by-piece basis  
 NAME OF JOB  
 Cook  
 DATE STARTED  
 Month - 09 [September] Year 94 [1994]  
 DATE LEFT  
 PRSNT [Present]  
 KIND OF BUSINESS  
 Cooking and Catering  
 DESCRIBE IN DETAIL DUTIES...  
 Cook, season, and prepare meals in a private household ....  
 NO. OF HOURS PER WEEK  
 40

(b)

NAME AND ADDRESS OF EMPLOYER  
 Van Nuys, California  
 NAME OF JOB  
 Cook  
 DATE STARTED  
 Month - 09 [September] Year 88 [1988]  
 DATE LEFT  
 Month - 02 [February] Year 94 [1994]  
 KIND OF BUSINESS  
 Private Household  
 DESCRIBE IN DETAIL DUTIES...  
 Cook, season, and prepare meals in a private household ....  
 NO. OF HOURS PER WEEK  
 40

A request for evidence was issued on September 16, 2004 by the director. As already stated, concerning the director's request for pertinent evidence of the beneficiary's requisite experience as stated on the labor certification petition, counsel submitted the following documents: a letter from the petitioner dated November 4, 2004, stating that the beneficiary's duties in the petitioner's household, and, stating in pertinent part "... Due to a

divorce in 2003 ... [the beneficiary] works partime/ [sic] on call approximately 16hrs per week @\$15.00 per hour;" and, a letter dated February 19, 1996, with its English language translation from [REDACTED] Director of the Fomento Deportivo, Cuernavaca, Mexico stating that the beneficiary was employed as a cook (Mexican food) from January 1985 to January 1987.<sup>9</sup>

There is no evidence of the above statements of work experiences included on the Form ETA 750, Part B. The above job experiences are not stated in the beneficiary's G-325A.

According to the beneficiary, a prior lay immigration representative neglected to include the subject work experience in her documents, and, she has therefore given a statement on appeal that is dated March 23, 2005 to correct the record as above noted. Although, the beneficiary adds a term of employment not found in the job reference given by [REDACTED] Director of the Fomento Deportivo, Cuernavaca, Mexico, the director does state in that letter that the beneficiary was employed as a cook (Mexican food) from January 1985 to January 1987 which confirms that the beneficiary possesses two years of job experience. We find this independent evidence conforms to the regulation at 8 CFR § 204.5(l)(3)(ii) (B).

On appeal, the beneficiary submits a statement that she gave an employment experience letter signed by Mr. [REDACTED] to her prior attorney because [REDACTED] employed her when the beneficiary came to the United States. She stated that she cannot locate [REDACTED] and, it is uncertain if her former employer is alive or deceased. The record of proceeding contains a letter from [REDACTED], dated January 29, 1991, on Cinivent Corporation letterhead stating that [REDACTED] at the time the verification was given, currently employed the beneficiary as a full time cook since September 1988. Although this letter was part of a prior petition deemed abandoned, since it was made part of the record of proceeding for the subject petition, it may be considered as additional evidence weighing in the petitioner's favor to establish the beneficiary's qualifications for the proffered position.

The AAO does find the beneficiary's work experience to be credible as both statements from the director and the petitioner were offered to show prior experience or training in the field or related field of domestic cook. There is independent objective evidence from by a letter from an employer giving the name, address, and title of the employer, and a description of the experience of the alien.

The director has raised an issue relating to the following statement given by the petitioner found a letter from the petitioner dated November 4, 2004, stating that the beneficiary's duties in the petitioner's household, and, stating in pertinent part "...Due to a divorce in 2003 ... [the beneficiary] works partime/on call approximately 16hrs per week @\$15.00 per hour." The issue relates to the intent of the petitioner to employ the beneficiary in a permanent fulltime position, once the visa is approved. See *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966).

In pertinent part, in the case, *Matter of Semerjian*, the court stated that, in resolving the question of intent to accept employment in the stated job of the labor certification, consideration may be given to factors such as whether the alien is presently employed, (and in that case, his/her profession) and, if not, the length of time he/she has not been so employed and the reasons therefore. Since the reason for the beneficiary's part-time (not full time) employment was transitory (a divorce), since the petitioner is pursuing the petition through the appeals process, since there is evidence mentioned above that the beneficiary is an experienced cook, and since there is an offer letter dated April 24, 2003, from the petitioner offering "regular full time " employment

<sup>9</sup> Further, according to a letter statement found in the record of proceeding, the cafeteria job was extended from July 1987 to July 1988.

as a Domestic Cook, there is sufficient evidence in the record of proceeding to show that the petitioner intends to employ the beneficiary in a permanent fulltime position, once the visa is approved, and, that the beneficiary intends to accept that position.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

The petitioner has demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.