

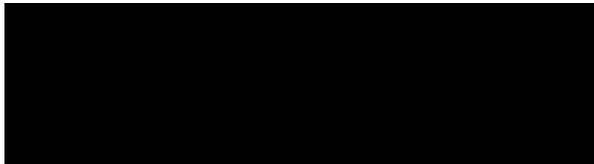
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services



B6

File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: AUG 12 2009
LIN 06 218 50913

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



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).

John F. Grissom
Acting 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 petitioner¹ 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 a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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 submits a brief statement and additional evidence.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated July 3, 2007, 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.

Beyond the decision of the director, an issue in this case is whether or not the petitioner had established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience.

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

¹ According to the Maryland Department of Assessments and Taxation information website, <http://sdatcert3.resiusa.org> accessed on July 17, 2009, the corporate charter of the petitioner was forfeited then revived on August 9, 2007.

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 DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted for processing by DOL on December 14, 2001, and certified on August 9, 2005. The petitioner filed the Form I-140 on July 14, 2006. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$21,603.40 per year²). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience in the related occupations of "Prep. Cook" or "Asst. Cook."

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.³

Relevant evidence in the record includes the original Form ETA 750, Application for Alien Employment Certification, certified by DOL; a support letter from the petitioner dated April 10, 2006; and the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2000,⁴ 2001, 2002, 2003, 2004, 2005 and 2006.

² The salary is based on a 35 hour work week as certified in the ETA 750. According to a support letter from the petitioner, the job requires a 40 hour work week. It is incumbent upon the petitioner to resolve any inconsistencies in the record by 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).

³ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

⁴ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 2000 federal income tax return generally.

The director issued a request for evidence (RFE) dated January 26, 2007, requesting additional evidence of the petitioner's ability to pay the proffered wage as follows: Wage and Tax Statements (W-2) and/or Form 1099-MISC Compensation Statements issued to the beneficiary by the petitioner for 2001, 2002, 2003, 2004, 2005 and 2006 along with information provided on the beneficiary's pay statements.

Counsel provided in response to the RFE the petitioner's IRS Form W-3 "Transmittal of Wage and Tax Statements" for 2000, 2001, 2002, 2003, 2004, 2005, and 2006; the petitioner's IRS Form 1120S tax return for 2005; a W-2 statement for 2004 issued by the petitioner to its owner; a "batch" W-2 Form for the petitioner stating total wages paid for 2006; and four earning statements from the petitioner to the beneficiary for the period February 3, 2007, to March 30, 2007, stating wages paid at the hourly rate of \$8.00 per hour.

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 July 9, 2000 and to currently employ 45 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The gross annual income stated on the petition was \$1,500,000.00. On the Form ETA 750, signed by the beneficiary on December 10, 2001, the beneficiary did not claim to have worked for the petitioner.

According to a Form G-325 in the record of proceeding prepared by the beneficiary under penalty of perjury, as dated June 14, 2006, the beneficiary stated she had been self-employed for the last five years as a cook.

Accompanying the instant appeal, counsel submits additional evidence which is two letters from the petitioner's accountant dated July 19, 2007, and July 23, 2007; the petitioner's IRS Form 1120S tax return for 2006; and a letter from the petitioner dated June 29, 2007.⁵

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, 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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

⁵ The letter details negotiations for the petitioner to purchase the Denny's restaurant franchise operation (#6062) located at 2314 Bel Air Road, Fallston, Maryland. The relevance of this letter to the issue of the petitioner's ability to pay the proffered wage from the priority date was not explained.

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

Counsel has submitted four earning statements from the petitioner to the beneficiary for the period February 3, 2007, to March 30, 2007, stating wages paid at the hourly rate of \$8.00 per hour. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, at 1080; *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 sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns⁶ demonstrate the following financial information concerning the petitioner's net income:

- In 2001, \$0.00.
- In 2002, \$0.00.
- In 2003⁷, <\$19,399.00>.⁸

⁶ 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 17e (2004-2005), and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

⁷ The petitioner elected S corporation status on March 11, 2003.

- In 2004, <\$19,744.00>.
- In 2005, <\$25,621.00>.
- In 2006, <\$6,224.00>.

The petitioner did not have sufficient net income to pay the proffered wage of \$21,603.00 for years 2001, 2002, 2003, 2004, and 2005, and 2006.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

- The petitioner's net current assets during 2001, 2002, 2003, 2004, 2005, and 2006, were <\$2,087.00>, \$8,172.00, <\$4,365.00>, <\$11,978.00>, <\$17,875.00>, and \$40,670.00 respectively.

Accordingly, from the priority date which is when the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of its net income or net current assets for years 2001, 2002, 2003, 2004, and 2005. In 2006 the petitioner had sufficient net current assets to pay the proffered wage.

⁸ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel asserts in his appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,¹⁰ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel submits a letter on appeal from the petitioner's accountant dated July 19, 2007, asserting that there are other methodologies (other than that utilized by the director) to determine "Ordinary Business Income," including the use of "the assets and liabilities" to determine the petitioner's ability to pay the proffered wage. Accordingly, he would "at least consider amortization"¹¹ and believes that depreciation should be regarded as assets on the tax returns for 2003, 2005 and 2006.

The accountant's contention that the petitioner's depreciation expenses should be considered as cash or a positive asset in the calculation of net income is misplaced. 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 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. Therefore, the petitioner cannot establish its ability to pay the proffered wage through depreciation or amortization as an asset.

A review of the tax returns submitted indicates that because of compensation withdrawn by the sole shareholder as officers' compensation in each year, the petitioner's net income is reduced. As stated

¹⁰ 8 C.F.R. § 204.5(g)(2).

¹¹ Intangible assets on a balance sheet are included as "other assets" and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles.

above, the petitioner's net income and net current assets for the period for which tax returns were submitted are less than the proffered wage except in 2006. Since the company has a sole owner, that owner may in his discretion take less officers' compensation. 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 Forms 1120 and 1120S of IRS U.S. Corporation Income Tax Returns. For this reason, the petitioner's figures for compensation of officers may be considered in some instances as additional financial resources in addition to its ordinary income. The owner elected to pay himself \$0.00, \$0.00, \$55,000.00, \$65,000.00, and \$55,000.00 for the years 2001, 2002, 2003, 2004, and 2005 respectively. Based upon the information submitted, since there is no evidence that the sole shareholder receives compensation other than through officers' compensation (other than in 2004), it is not reasonable to assume that the sole shareholder would relinquish some, or substantially all of his return on his investment received as officers' compensation. Further, there is no evidence in the record to demonstrate that the sole shareholder desired to relinquish in whole or in part his officers' compensation in order to pay the proffered wage.

Counsel also submitted the beneficiary's personal IRS Form 1040 tax returns for 2003, 2004, and 2005. The tax returns do not state the source of the beneficiary's income (i.e. by W-2 or 1099-MISC statements) other than to report on Schedule U on each of the tax returns that it was "Tip Income" earned through self-employment. In 2002, 2004 and 2005, the beneficiary earned \$3,500.00, \$6,000.00, and \$5,500.00 as tip income. These earnings are less than the proffered wage and there is no evidence that they were earned through the petitioner's restaurant.

USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner (or in this case the beneficiary's personal income) to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

USCIS may consider longevity, the number of employees, the petitioner's business reputation as well as 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

There is no evidence demonstrating unusual or novel expenses, losses or costs that would have depressed the net income of the petitioner during the relevant time period. At no time has petitioner demonstrated expectations for increased earnings from employment of the beneficiary by boosting profits. Thus, assessing the totality of the circumstances in this individual case, the petitioner has not established that it had the continuing ability to pay the proffered wage for any year but 2006.

Counsel has submitted the petitioner's IRS Form W-3 "Transmittal of Wage and Tax Statements" for a seven year period. While the Form statements show a consistent history of wage payments, the statements do not establish the petitioner's ability to pay the proffered wage. Wage paid to others generally will not demonstrate the petitioner's ability to pay for the instant beneficiary. See *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date for years 2001, 2002, 2003, 2004, and 2005.

The Beneficiary's Qualifications

An issue in this case is whether or not the petitioner had established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience.¹²

The regulation at 8 C.F.R. § 204.5(l)(3) 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

¹² See Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).

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 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).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

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

Prepares, cooks, seasons, soups, salads, meats, vegetables, desserts, and other foodstuffs for consumption according to recipe. Use ovens, broilers, grills, roasters, and steam kettles and other kitchen utensils.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:¹³

<i>Education:</i>	Grade School: <u>blank</u>
	High School: <u>blank</u>
	College: <u>blank</u>
	College degree: <u>blank</u>
<i>Major Field Study:</i>	<u>blank</u>

¹³ Numerous special conditions were enumerated but none relating directly to the duties of the offered job, cook.

Experience: 2 years in the position offered or 2 years as "Prep. Cook, Asst. Cook."

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. 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. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In assessing the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the AAO notes that the beneficiary listed her prior elementary education as received in Oruro, Bolivia, and her attendance at Liceo de Senioritas Huanuni, High School, Oruro, Bolivia, between February 1966 to November 1972.

The beneficiary listed her employment experience as a cook with a bakery/caterer called Pasteleria Caranavi, situate in La Paz, Bolivia, between October 1992 to January 1999. The beneficiary described her duties there as "Baked cakes, cookies, etc. for use at dinners, functions etc. Took orders for cakes etc. Prepared ingredients. Baked items. Transported or arranged transportation to location where served." Based upon the nature of the employer as a bakery/caterer and the beneficiary's duties during this period, the beneficiary was employed as a baker, not as a cook.

Additional experience was listed by the beneficiary on the Form ETA 750B. She stated she was employed as a kitchen supervisor between January 1996 to August 2000 in a restaurant identified as Restaurante Elli's, La Paz, Bolivia. Her duties there were to "Coordinate activities of workers in kitchen, helpers, and dishwashers. Prepare vegetables, cook a variety of normal Creole dishes, and also cakes." Counsel has submitted an employment reference dated April 18, 2007, from Restaurante Elli's which confirmed the above employment experience. Based upon the nature of the employer as a restaurant and the beneficiary's duties during this period, the beneficiary was employed there as a kitchen supervisor, not as a cook.

Other than the above, the beneficiary stated on the Form ETA 750B that she was unemployed from October 1992. Therefore based upon an examination of the beneficiary's education and employment experience as set forth in the labor certification, the beneficiary does not have two years of qualifying experience as a cook.

According to the USCIS Form G-325 prepared by the beneficiary under penalty of perjury on June 14, 2006, she stated that she was self employed as a cook from 2000 to the present time (i.e. December 10, 2001). As already stated, however, the beneficiary's personal U.S. Internal Revenue Service (IRS) Form 1040 tax returns for 2003, 2004, and 2005 submitted into evidence do not state the source of the beneficiary's income (i.e. W-2 or 1099-MISC statements) other than to report on Schedule U of the tax returns that it was "Tip Income" earned through self-employment. The nature

of the self employment was not stated. It is incumbent upon the petitioner to resolve any inconsistencies in the record by 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). According to the petition, the beneficiary entered the United States on September 12, 2000. There is no substantiation in the record of any of the beneficiary's employment experience through W-2 or Form 1099-MISC statements, pay stubs cancelled checks or wage deposits until the four pay statements issued to the beneficiary by the petitioner in 2007 as mentioned above.

Therefore, the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as a cook from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

As stated, the evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date for years 2001, 2002, 2003, 2004, and 2005.

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.