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FILE: [REDACTED]
SRC-06-146-50366

Office: TEXAS SERVICE CENTER Date: FEB 20 2009

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:

[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).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

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

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

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

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$14.68 per hour (\$30,534.40 per year). The Form ETA 750 states that the position requires six months of experience in the job offered or one year of experience as a housekeeper.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka*

v. U.S. Dept. of Transp., NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief as well as copies of previously submitted evidence. Relevant evidence in the record includes the petitioner's IRS Form 1120S U.S. Corporation Tax Returns for the years 2001 through 2004 and the beneficiary's IRS Form 1040 Individual Income Tax Returns for the years 2001 through 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the I-140 petition the petitioner claimed to have been established in 1997, to have a gross annual income of \$500,000, a net annual income of \$80,000, and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on April 20, 2004, the beneficiary claimed to have worked for the petitioner since September 1998.

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, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. As noted above, the beneficiary stated on the Form ETA 750B that she has worked for the petitioner since September 1998. However, the record does not contain copies of W-2 Wage and Earnings Statements issued to the beneficiary by the petitioner, nor does it contain payroll records or other primary evidence of wages paid to the beneficiary by the petitioner. As noted above, the record does contain copies of the beneficiary's individual tax returns for the years 2001 through 2005. Included with each tax return is Schedule C-EZ, Net Profit from Business. The beneficiary's principal business is listed as "housekeeper" on each Schedule C-EZ. Also included with each tax return is Form 9465 Installment Agreement Request. Mountain Star

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Lodge is listed as the employer on each Form 9465. Counsel states these tax returns and related forms establish the petitioner's ability to pay the proffered wage. We disagree.

First, it is noted that the Form 9465 Installment Agreement Requests have not been signed by the beneficiary. Second, the record does not contain any other evidence of wages paid to the beneficiary by the petitioner such as a W-2 Wage and Earnings Statement, 1099-MISC Miscellaneous Income form, or payroll records. Third, as discussed below, even if we were to consider the amounts listed in the beneficiary's individual tax returns, we would still find that the petitioner has failed to establish its ability to pay the proffered wage. The beneficiary listed the following amounts as business income on her individual tax returns for the years 2001 through 2005: \$15,000 in 2001; \$13,000 in 2002; \$15,000 in 2003; \$16,000 in 2004; and \$20,000 in 2005. Assuming that these figures represent the amount paid to the beneficiary by the petitioner each year, the petitioner would need to establish that it had the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary as follows: \$15,534 in 2001; \$17,534 in 2002; \$15,534 in 2003; \$14,534 in 2004 and \$10,534 in 2005.

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. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003 and 2004, as shown in the table below.²

- In 2001, the Form 1120S stated net income³ of -\$37,543.00.
- In 2002, the Form 1120S stated net income⁴ of -\$128,713.00.
- In 2003, the Form 1120S stated net income⁵ of -\$70,965.00.
- In 2004, the Form 1120S stated net income⁶ of -\$131,388.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2001, 2002, 2003 or 2004. The petitioner failed to submit a copy of its income tax return for 2005 and has therefore failed to establish that it had sufficient net income to pay the proffered wage in 2005.⁷

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ Counsel states in his brief that the petitioner's total assets as stated on the petitioner's corporate tax returns should be considered in determining the petitioner's ability to pay the proffered wage. However, the petitioner's total assets include things such as land and "buildings and other depreciable assets." Such assets are likely to have a life of greater than one year, and thus are not considered to be available to the petitioner to pay the proffered wage within a given year. Therefore, we will consider only the petitioner's net current assets in determining the petitioner's ability to pay the proffered wage.

A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net

² Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (on income tax returns for the years 1997 through 2003) line 17e (on returns for the years 2004 and 2005) or line 18 (on returns for the year 2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 30, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

³ As reported on Schedule K, Line 23. See footnote 3, above.

⁴ As reported on Schedule K, Line 23. See footnote 3, above.

⁵ As reported on Schedule K, Line 23. See footnote 3, above.

⁶ Ordinary income as shown on line 21 of page one of the petitioner's IRS Form 1120S. See footnote 3, above.

⁷ Even if we assume that the "business income" listed in the beneficiary's tax returns represents wages paid to the beneficiary by the petitioner, the petitioner's net income is still insufficient in each year to establish the petitioner's ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary.

⁸ 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.

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 tax returns demonstrate its end-of-year net current assets for the years 2001 through 2004, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$294.00.
- In 2002, the Form 1120S stated net current assets of \$19,872.00.
- In 2003, the Form 1120S stated net current assets of -\$677.00.
- In 2004, the Form 1120S stated net current assets of \$42,863.00.

The petitioner did not have sufficient net current assets to pay the proffered wage in 2001, 2002, or 2003. The petitioner failed to submit a copy of its income tax return for 2005 and has therefore failed to establish that it had sufficient net current assets to pay the proffered wage in 2005. The petitioner did have sufficient net current assets to pay the proffered wage in 2004.⁹

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2001, 2002, 2003 or 2005 through wages paid to the beneficiary, net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Specifically, counsel, citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), states that the petitioner's ability to pay is reflected by the fact that the petitioner's gross receipts increased each year from 2001 through 2004, the petitioner's total assets increased each year from 2001 through 2004, and the salaries and wages paid by the petitioner increased each year from 2001 through 2004.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

⁹ If we assume that the "business income" listed in the beneficiary's tax returns represents wages paid to the beneficiary by the petitioner, the petitioner would have sufficient net current assets to establish the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2002 and 2004. The petitioner would not have sufficient net current assets to establish the ability to pay in 2001, 2003 or 2005.

In this case, the petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the record does not establish that the beneficiary was qualified to perform the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien 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, 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The petitioner must 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14, states that the minimum experience for a worker to satisfactorily perform the duties of executive housekeeper is six months of experience in the job offered or one year of experience as a housekeeper.

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 trainer or employer, and a description of the training received or the experience of the alien.

....

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be

accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner did not provide any evidence of the beneficiary's experience with I-140 petition. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position with one year of experience in the proffered position.

Finally, it is noted that the petitioner erroneously sought classification for the beneficiary as a professional or skilled worker under sections 203(b)(3)(A)(i) and (ii) of the Immigration and Nationality Act. A "professional" is a qualified immigrant who holds at least a bachelor's degree. A skilled worker is a qualified immigrant who is 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 ETA 750 states that the proffered position requires only six months of experience in the job offered or, in the alternative, one year of experience as a housekeeper. The ETA 750 does not list any educational requirements for the proffered position. Therefore, the proffered position does not meet the requirements for classification as a professional or skilled worker under sections 203(b)(3)(A)(i) and (ii) of the Act.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.