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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
WAC 04 035 51492

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 02 2009**

IN RE:

Petitioner:

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)

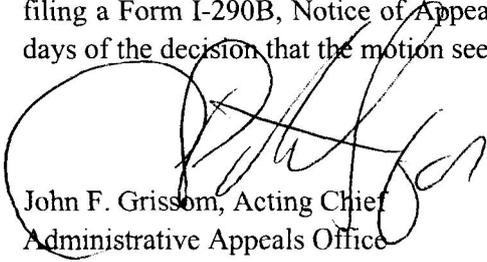
ON BEHALF OF PETITIONER:

[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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary had the minimum employment experience required by the certified labor certification and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and maintains that the beneficiary has the necessary work experience.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 2, 2001.¹ The ETA 750B, signed by the beneficiary on March 12, 2001, indicates that he has been unemployed from March 1996 to the present (date of signing). The only other job that is listed is that of a Chinese cook. The beneficiary states that he performed this job, 40 hours per week, from August 1987 to December 1990. The name and address of the restaurant that he worked for is identified as [REDACTED], China.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that no formal education is required, but an applicant must have two years of work experience in the job offered as a Chinese cook.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on November 19, 2003, indicates that the petitioner was established in 1995, currently employs sixty workers and claims a gross annual income of \$2,778,166.

Relevant to employment experience gained in the job offered by the priority date of April 2, 2001, the petitioner provided a "Certificate of Professional Experience." According to the English translation, it was signed on February 6, 2001, by a notary named [REDACTED] at the [REDACTED] Notary Public Office and represented (2001) [REDACTED] certificate. It affirmed that the beneficiary was "engaged in the work of cooking of [REDACTED] Restaurant from August 1987 to December 1990 (was evaluated as Grade-3 Chef by [REDACTED] Labor Bureau on June 20, 1990)." It is noted that the translation of this document did not conform to the provisions of 8 C.F.R. § 103.2(b)(3), which provides that the English translation of a document in a foreign language must be certified as complete and accurate and that by the translator's certification, he/she is competent to translate from the foreign language into English.

The petitioner provided a letter, dated January 2007, signed by "[REDACTED]," as the former general manager and business legal representative of "[REDACTED]" in Guangzhou city from June 1984 to June 1997. He states that the beneficiary was a chef at [REDACTED] from 1987 to 1990. He additionally states that [REDACTED] discontinued operations in February 1997 but that it had been located at [REDACTED] Guangzhou City until April 1995, when the operation

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

moved to [REDACTED], Guangzhou City. It is noted that [REDACTED] referred to the restaurant as [REDACTED] not as [REDACTED] as specified on the ETA 750B.

The United States Citizenship and Immigration Services (USCIS) subsequently requested an overseas consulate investigation in order to verify the beneficiary's claimed work experience. An investigator's report, dated November 29, 2006, informed the director that the Guangdong Province Notary Administrative Office of the Department of Justice had been contacted by letter and had advised the investigator that the Certificate of Professional Experiences (2001) YC.Zi, [REDACTED] had been fabricated.

On January 31, 2007, the director issued a notice of intent to deny the petition. He informed the petitioner that pursuant to 8 C.F.R. § 103.2(b)(16)(i),² that the overseas investigation determined that the Certificate of Professional Experience, number 35671, was fabricated based on information received from the [REDACTED] notary office. The director questioned the validity of the evidence offered in support of the beneficiary's employment experience and afforded the petitioner thirty (30) days to provide additional information or rebuttal.

In response to the notice of intent to deny, the petitioner, through counsel, questioned the specificity of the director's use of the term "fabricated" and supplied an additional Certificate of Professional Experiences, [REDACTED], from the [REDACTED] Notary Public Office, dated February 6, 2007, which contained the same information as the earlier certificate. The translation of this document also did not comply with the provisions of 8 C.F.R. § 103.2(b)(3).

The director denied the petition on March 5, 2007, based on the finding that the certificate number [REDACTED] issued in 2001 had been forged. The director also indicated that the other evidence consisting of the private letter from [REDACTED] and the new certificate of professional experience number [REDACTED] which restated the forged certificate information, did not resolve the inconsistency presented by the original fabricated certificate of professional experience.

On appeal, counsel submits the beneficiary's declaration in which he disclaims any knowledge of the forged certificate of his prior employment experience and explains that he hired a local California business identified as the "[REDACTED] Notary Public Office" to secure his employment verification documents from China. Copies of this firm's business card and a copy of its advertisement in a local Chinese newspaper are also submitted.

Counsel asserts that the [REDACTED] letter and the new certificate of professional experience, along with the beneficiary's statement that he hired a local service to obtain the original certificate, and therefore had no reason to know of any fabrication, was sufficient to overcome any inconsistencies in the

² 8 C.F.R. § 103.2(b)(16)(i) requires USCIS to advise a petitioner of derogatory information relevant to its petition and offering an opportunity to present information on his/her own behalf before a decision rendered.

record and establish that the beneficiary had sufficient prior work experience to merit the petition's approval.

The AAO cannot conclude that the director erred in his decision to deny the petition based on the fabricated certificate of professional experience, subsequent certificate no. [REDACTED] without a conforming English translation of the Pan letter. The new certificate restated the same information and did not provide any additional objective, competent evidence such as evidence of compensation paid or whether the employment was full-time or part-time. Nor is the submission of a fabricated document overcome by the beneficiary's disclaimer on appeal. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As determined by the director, 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). In view of the foregoing, we do not conclude that sufficient competent and probative evidence has been submitted that would overcome the prior submission of a fabricated document intended to establish the beneficiary's required past work experience.

Beyond the decision of the director, we do not find that the petitioner submitted sufficient evidence to demonstrate its continuing ability to pay the proffered wage of \$2,200 per month or \$26,400 per year as set forth on the Form ETA 750.³

In support of the petitioner's ability to pay the proffered wage, it provided the copies of its U.S. Income Tax Return(s) for a S Corporation (Form 1120S) for 2001, 2002, 2003, 2004 and 2005. They contain the following information:

	2001	2002	2003	2004	2005
Net Income ⁴	\$ 6,583	\$ 14,717	-\$ 86,863	\$ 24,735	\$ 10,357

³ The regulation at 8 C.F.R. § 204.5(g)(2) also 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.

⁴Where 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

Current Assets	\$116,190	\$205,140	\$182,397	\$321,203	\$196,335
Current Liabilities	\$308,907	\$381,582	\$427,574	\$436,292	\$442,661
Net Current Assets	-\$192,717	-\$176,442	-\$245,177	-\$115,089	-\$246,326

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

Copies of Wage and Tax Statements (W-2s) indicate that the petitioner paid the following wages to the beneficiary:

	Wages
2004	\$27,415.26
2005	\$20,815.29

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual

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 (2001-2003) or on line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. In this case, this petitioner had additional income and/or other adjustments from sources other than a trade or business so its net income is reflected on line 23 for 2001, 2002, and 2003 on its tax return(s). Its net income is shown on line 17e of its tax returns for 2004 and 2005.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the record indicates that the petitioner paid the beneficiary \$20,815.29 in 2004 or \$5,584.71 less than the proffered salary. It is noted that a bank letter dated December 15, 2004, affirming deposit accounts beginning in July 1994 and noting that the petitioner's current balance is in the low six figures is not sufficiently probative of the petitioner's ability to pay the proffered salary in 2004 as it does not include consideration of other liabilities and encumbrances that may affect the petitioner's financial profile.⁶ However, as this shortfall could be covered by the petitioner's net income of \$24,735 as reported on its 2004 tax return, the petitioner has established its ability to pay the proffered wage in 2004.

Similarly, as the petitioner paid the beneficiary more than the proffered salary in 2005, its ability to pay the beneficiary's proposed wage offer has been demonstrated for this year. However, the petitioner must demonstrate the ability to pay from April 2001 onward and has not demonstrated that its ability to pay the certified wage for 2001, 2002, or 2003.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

In this case, the petitioner has not established its ability to pay the certified wage of \$26,400 per year in 2001 because neither its net income of \$6,583 nor its net current assets of -\$192,717 was sufficient to cover the proposed wage offer.⁷

⁶ Available end-of-year cash would also be shown on line 1 of Schedule L of the corresponding tax return and included in the calculation of net current assets. Here, there is nothing to show that the cash mentioned represents cash that would be additional to that listed on Schedule L.

⁷ Additionally, USCIS records reflect that the petitioner has sponsored at least two additional workers. The petitioner would need to demonstrate that it could pay all sponsored workers from their respective priority dates until they obtain permanent residence.

In 2002, the petitioner failed to demonstrate its ability to pay the certified wage because neither its net income of \$14,717 nor its net current assets of -\$176,442 was sufficient to cover the proposed wage offer.

In 2003, neither the petitioner's net income of -\$85,863 nor its net current assets of -\$245,177 was sufficient to pay the proffered salary of \$26,400 or establish its ability to pay in that year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its *continuing* financial ability to pay the certified salary as of the priority date. 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).

As noted above, the petitioner's ability to pay the proffered salary was demonstrated in 2004 and 2005, but was not established in 2001, 2002, and 2003.

The AAO concurs with the director's conclusion that the petitioner failed to establish that the beneficiary possessed the requisite qualifying employment experience as of the priority date. Further, in this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the full proffered salary as of the priority date.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.