



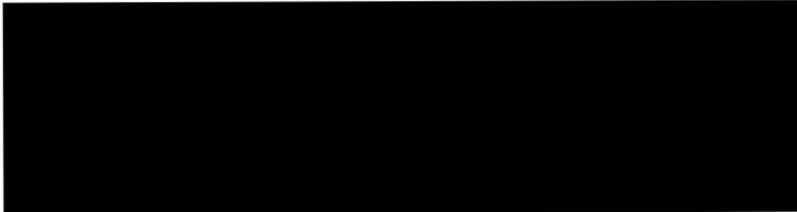
U.S. Citizenship
and Immigration
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Office: VERMONT SERVICE CENTER

Date: JAN 23 2009

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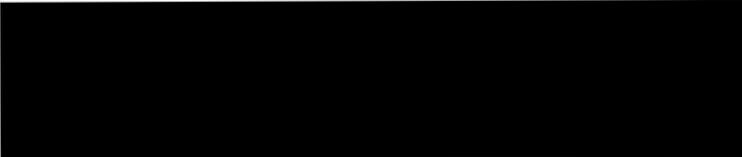
Petitioner:

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.

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

The petitioner is a Japanese and Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean style cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, 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.

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 December 19, 2006,¹ 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 director's decision,² the petitioner has not demonstrated that the beneficiary meets the job qualifications as stated in the labor certification. Specifically, the petitioner has not demonstrated by independent, objective and consistent evidence that the beneficiary has two years of experience in the occupation of a Korean style cook.

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:

¹ The petitioner filed two prior I-140 petitions on behalf of the beneficiary: U.S. Citizenship and Immigration Services (USCIS), record number EAC 04 130 50033, that was denied on August 25, 2004, and record number EAC 05 011 50063 denied on April 29, 2005. The subject case is the third employment based immigrant petition filed for the beneficiary by the petitioner.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 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, accepted for processing by any office within the employment system of 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 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 January 31, 2002.³ The petitioner filed the Form I-140 on June 29, 2005, and the petitioner identified on that form is [REDACTED] and [REDACTED] at [REDACTED] Palisades Park, New Jersey.⁴ The proffered wage as stated on the Form ETA 750 is \$470.00 per week⁵ (\$24,440.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

³ It has been over six years since the Application for Alien Employment Certification 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." However, in accordance with 8 C.F.R. § 204.5(g)(2) the petitioner must demonstrate that it can pay the proffered wage from the time of the priority date.

⁴ The petitioner submitted a copy of the original labor certification and referred to the original filing. The name of the applicant on the Application for Alien Employment Certification is [REDACTED] House Korean and Japanese Restaurant which stated its address as [REDACTED] Rutherford, New Jersey, and the name on the I-140 petition is [REDACTED] p., which has a different address. Therefore, both the corporate names are different as well as the petitioner's address. If this matter is pursued, the petitioner must provide an explanation for these differences.

⁵ The wage rate as found on the original Form ETA 750 contains an alteration (a "white-out") with the weekly wage rate of \$470.00 handwritten on the Form. This change does not contain a stamp mark utilized by DOL to indicate an approved alteration and change on the form as submitted by the petitioner. As it is the procedure for DOL to also include correspondence requesting and then approving such changes to the Application for Alien Employment Certification (the application) as originally submitted (and there are none in the record), it is unclear whether this alteration was made during the review process and prior to certification, or at a later date. The petitioner must clarify this

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.⁶

Evidence in the record includes copies of the following documents: the Form ETA 750, Application for Alien Employment Certification, approved by DOL; [REDACTED]'s U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002, 2003 and 2004; the beneficiary's U.S. Internal Revenue Service Form 1040 tax return and a W-2 Wage and Tax Statement for 2005 issued by the petitioner to the beneficiary in the amount of \$24,440.00.

Ability to Pay the Proffered Wage

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1995 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year begins on August 1st and ends on July 31st of each year. The net annual income and gross annual income stated on the petition were \$20,000.00 and \$620,000.00 respectively. On the Form ETA 750, signed by the beneficiary on January 24, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that according to a letter statement from the petitioner's accountant, the petitioner had the ability to pay the proffered wage from the priority date.

Accompanying the appeal, counsel submits additional evidence that includes the following documents: a letter from the petitioner's accountant dated January 4, 2007; W-2 Wage and Tax Statements for 2005 and 2006 issued by [REDACTED] to the beneficiary in the identical amounts of \$24,440.00. Counsel also re-submitted [REDACTED]'s U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002, 2003 and 2004.

Therefore, the W-2 statements will not be accepted as evidence of the petitioner's ability to pay the proffered wage.

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

issue as well in any further filings.

⁶ The submission of additional evidence on appeal is allowed by the instructions to the 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).

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. 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 submitted W-2 Wage and Tax Statements for 2005 and 2006 issued by [REDACTED] to the beneficiary in the identical amounts of \$24,440.00. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001. In order for the AAO to accept the wages that "JSC" paid to the beneficiary, the petitioner must establish that it does business as [REDACTED] Korean and Japanese Restaurant or that it is successor-in-interest to [REDACTED] Korean and Japanese Restaurant. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The petitioner here has not established either. Therefore, the W-2 statements will not be accepted as evidence of the petitioner's ability to pay the proffered wage.

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 supported by federal case law. *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 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 entity listed on the tax returns is [REDACTED]. The tax returns demonstrates the following financial information:

- In 2001,⁷ the Form 1120 stated net income of \$21,831.00.
- In 2002, the Form 1120 stated net income of \$19,171.00.
- In 2003, the Form 1120 stated net income of \$18,613.00.
- In 2004, the Form 1120 stated net income of \$37,507.00.

In order to consider [REDACTED]'s tax returns as evidence of the initial labor certification's applicant's ability to pay, the petitioner must establish the relationship between [REDACTED] and [REDACTED] Korean and Japanese Restaurant.

Since the proffered wage is \$24,440.00 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for tax years 2001, 2002 and 2003. In year 2004 the petitioner did have sufficient net income to pay the proffered wage.⁸ However, only the petitioner may establish this financial ability. In 2005 and 2006, the petitioner must demonstrate its relationship to the initial labor certification's applicant in order to accept the W-2 statements submitted.

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.

⁷ Since the petitioner's fiscal year begins on August 1st and ends on July 31st of each year and the priority date is January 31, 2002, the petitioner's 2001 tax return is relevant here.

⁸ To prevail, the petitioner must establish that [REDACTED] Korean and Japanese Restaurant and [REDACTED] are the same company or that [REDACTED] does business as [REDACTED] Korean and Japanese Restaurant.

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.

The petitioner's net current assets during 2001, 2002, 2003, and 2004 were \$9,487.00, <\$23,695.00>, <\$47,745.00> and <\$26,394.00> respectively.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets for tax years 2001,¹⁰ 2002 and 2003.

The petitioner submitted a letter on appeal from its accountant. The accountant in his letter dated January 4, 2007, asserts that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to the regulation,¹¹ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

According to the petitioner's accountant the petitioner's depreciation expense may be added back to increase the petitioner's net income in tax years 2001, 2002, 2003 and 2004. The petitioner's appellate argument that the petitioner's depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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* 719 F. Supp. at 537. Therefore the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

Based upon the foregoing, the petitioner failed to establish its ability to pay the proffered wage from the time of the priority date onward.

¹⁰ As already stated, since the petitioner's fiscal year begins on August 1st and ends on July 31st of each year and the priority date is January 31, 2002, the petitioner's 2001 tax return is relevant here.

¹¹ 8 C.F.R. § 204.5(g)(2).

Qualifications of the Beneficiary

As already stated, beyond the director's decision the petitioner has not demonstrated that the beneficiary meets the job qualifications as stated in the labor certification. Specifically, the petitioner has not demonstrated by independent, objective and consistent evidence that the beneficiary has two years of experience in the occupation of a Korean style cook.

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 unavailable in the United States.

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 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).

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.

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 in Blocks 14 and 15:

Block 14:

Grade School	8
High School	Blank
College	Blank
College Degree Required	Blank
Major Field of Study	Blank

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision.

Block 15

Block 15 of Form ETA 750A relating to “Other Special Requirements” is blank.

According to Form ETA 750, Part B, dated by the beneficiary on January 24, 2002, the beneficiary stated that he was unemployed from November 2000 to present (i.e. January 24, 2002). The beneficiary was employed by [REDACTED] Restaurant, Kyung Ki Do, Korea, as a cook Korean style from May 1997 to March 1999, and after which he was employed as a cook Korean style for [REDACTED], in Seoul, Korea, from March 2000 to October 2000.

Evidence in the record includes a USCIS Form G-235, signed by the beneficiary May 25, 2005, which states that the beneficiary was employed as a cook for [REDACTED] in Seoul, Korea, from March 2000 to October 2001, and was unemployed from November 2001 to present time (i.e. the date of signature, May 25, 2005).¹²

According to an affidavit in the record submitted by the petitioner from [REDACTED], owner of the [REDACTED] Restaurant, Kyung Ki Do, Korea, the beneficiary was employed as a cook in his restaurant during two time periods, May 1997 to March 1999, and March 2000 to October 2000. The affidavit fails to document whether the beneficiary’s experience was on a full-time or a part-time basis. If the beneficiary’s employment was less than full-time, the petitioner may not be able to establish that the beneficiary had the required full two years of experience in the position. Therefore, the affidavit of work experience is insufficient to document that the beneficiary had the required two years of experience.

¹² The record contains a 2005 W-2 statement for the beneficiary which appears to be his wages for a full year. Therefore, the beneficiary’s statement that he was unemployed until May 2005 is inconsistent with evidence in the record. The petitioner should provide the beneficiary’s certified Internal Revenue Service tax returns for 2005 and 2006 if this matter is pursued.

Further, as can be observed from the above sworn evidence submitted, there are inconsistencies in both the time periods of the beneficiary's work experiences.

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). 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).

The petitioner has not demonstrated that the beneficiary meets the job qualifications as stated in the labor certification. Further, the evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains permanent residence. The petition will be denied for the above stated reasons, with each considered an independent 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.