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



U.S. Citizenship  
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Services

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FILE: SRC 07 187 54317 Office: TEXAS SERVICE CENTER Date: 'JUL 15 2009

IN RE: Petitioner:  
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 K. 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a chef of Italian cuisine. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, 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.

As set forth in the director's August 10, 2007 denial, two issues are addressed. First, the director determined that the petitioner did not have the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also noted that the petition was denied because the certified ETA 9089 had been altered to change the dates that the beneficiary had worked for the requisite two years of work experience in Italy. The AAO will first examine the petitioner's ability to pay the proffered wage and then comment on the altered Form ETA 9089.

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

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 9089 was accepted on April 6, 2007. The proffered wage as stated on the Form ETA 9089 is \$23,750 per year. The Form ETA 9089 states that the position requires two years of experience in the proffered job.

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.<sup>1</sup> On appeal, counsel submits a brief with following evidence:

A letter dated September 4, 2007 written by [REDACTED] Weber & Mony P.C. Farmington Hills, Michigan. In his letter, [REDACTED] explains that a domestic business entity organized as an LLC under the law of the state of Illinois elects to be treated as a partnership for tax filing purposes.

An IRS publication "2006 Instructions for Form 1065." An excerpt is highlighted that states a domestic LLC with at least two members that does not file Form 8832 is classification as a partnership for federal income tax purposes.

A copy of counsel's letter to the DOL requesting a duplicate copy of the petitioner's certified ETA 9089;

A copy of the petitioner's state of Illinois Corporate database entry as of September 7, 2007, found at <http://www.ilsos.gov/corporatellc/CorporateLlcController> (available as of June 23, 2009.) According to this entry, the petitioner<sup>2</sup> filed for incorporation on June 19, 2006 and as of May 21, 2007 was in good standing.

With the initial petition, the petitioner submitted its IRS Form 1065, U.S. Return of Partnership Income for tax year 2006. This document indicates the petitioner has ordinary business income of - \$70,714 in tax year 2006. The petitioner also submitted copies of February 2007 statements from a savings account and a checking account with Chase Bank, Baton Rouge, Louisiana. The petitioner's savings account indicates an ending balance of \$25,070.54, while its checking account has an ending balance of \$26,076.03. The petitioner also submitted a letter of work experience written by Mr.

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<sup>1</sup> 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).

<sup>2</sup> The petitioner operates under the name Adesso Restaurant.

██████████ Ice Cream Parlor, Restaurant dated November 20, 2006. In his letter, ██████████ states that the beneficiary worked fulltime as a cook of Italian cuisine from January 1999 to October 2002. The petitioner also submitted a certified Form ETA 9089 that changed the dates of employment by the beneficiary at the La Pace Restaurant from July 15 1989 to April 30, 1993, to the dates stated in ██████████ letter, namely January 1999 to October 2002. The beneficiary initialized these changes. Counsel in his cover letter also notes the dates of the beneficiary's employment as January 1999 to October 2002.

The director sent the petitioner a Notice of Intent to Deny (NOID) stating that the petitioner needed to submit more evidence with regard to the petitioner's ability to pay the proffered wage in 2006, and that the petitioner could not make corrections to the Form 9089 after it was submitted to the DOL. The director requested that the petitioner submit a new ETA 9089 that is certified before the filing date of the I-140 petition, namely, June 5, 2007.

In response to the director's NOID, counsel states that the changes to the beneficiary's dates of prior employment is not material to the petition's approval, and that the difference in dates resulting from a typographical error should not result in the petition being denied. Counsel also states that the petitioner cannot obtain the issuance of a duplicate application from DOL, and that the request for such a duplicate must come directly from USCIS. Counsel requests that USCIS obtain a duplicate copy of the certified ETA 9089.

With regard to the petitioner's ability to pay the proffered wage, counsel states that the petitioner is a relatively new business enterprise that began business operation in October 2006 and accordingly, the petitioner's Form 1065 for 2006 does not show significant financial income. Counsel submitted a copy of the petitioner's reviewed financial statement for the first half of calendar year 2007. Counsel describes this evidence as more probative than the 2006 tax return which represented start-up operations. Counsel refers to the Adjudicator's Field Manual and states that this manual clearly demonstrates that reviewed financial statements are an acceptable and probative form of evidence for small privately-held employers who do not normally issue annual report or audited financial statements. Counsel also references a May 2004 memorandum on the petitioner's ability to pay written by William R. Yates, former USCIS Associate Director of Operations.<sup>3</sup> With reference to the Yates memo, counsel examines the petitioner's current assets and liabilities for the first six months of 2007 as listed on the petitioner's reviewed financial statement and notes the petitioner has net current assets of \$34,626. Counsel also notes that based on the USCIS Adjudicator's Field Manual, the standard of proof applied in most administrative immigration proceedings is the "preponderance of the evidence" standard. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the director ignored the additional evidence submitted. Counsel notes the distinction made by the director with regard to "direct" and "indirect" evidence, and states that

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<sup>3</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

USCIS provides no legal authority for this distinction, and the use of such terminology suggests that additional evidence is less probative than the initial evidence. Counsel notes that the regulations only distinguish between initial evidence and additional evidence. Counsel reiterates that the Adjudicator's Field Manual specifically includes the submission of reviewed financial statements as "acceptable evidence." Counsel states that for USCIS to ignore evidence that it has the discretion to accept without explaining why it has done so is an abuse of discretion.

Counsel also points out that the petition's priority date is in 2007, a period of time more recent than the petitioner's 2006 Form 1065 and thus, the director should have considered the additional evidence submitted by the petitioner as more probative than the default initial evidence of income tax returns, annual reports or audited financial statements. Counsel notes that the petitioner's 2006 tax return reflected operations that totaled less than three months, which makes the document less probative of the petitioner's true ability to pay the proffered wage. Counsel reiterates his assertions with regard to the petitioner's 2007 reviewed financial statement being more relevant to determining the petitioner's ability to pay the proffered wage as of April 6, 2007 and thereafter. Utilizing the figure of \$34,626 as the petitioner's net current assets, counsel states that the petitioner's six month net current assets exceed the proffered wage of \$23,750 by \$10,893, or more than 45 percent of the proffered wage.

Counsel also asserts that the director erred by not adjudicating the petition based on the original unaltered information on the petitioner's ETA 9089 with regard to the beneficiary's work experience, or by not requesting a duplicate ETA 9089 from the DOL. Counsel describes the initialized changes on Section K-b, Job Two of the ETA 9089 as "incorrectly listed due to a typographical error." Counsel states that the director's statements with regard to not accepting corrections on the ETA 9089 is not in the DOL regulations but rather appears in the DOL Frequently Asked Questions (FAQ, printed on the DOL website. Counsel states that the information with regard to corrections was not issued under the rule-making procedures of the Administrative Procedures Act and does not have the force of law.

Counsel reiterates that the changes on the ETA 9089, Section K-b are not material to the adjudication of the instant petition. Counsel notes that the petitioner submitted clear evidence of the beneficiary's eligibility for the proffered position including the correct dates of prior employment in the letter from the beneficiary's former employer.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.<sup>4</sup> On the petition, the petitioner claimed to have been established in 2006 and to

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<sup>4</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole

currently employ ten workers. According to its federal tax returns, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on 21 May 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 (Reg. Comm. 1967).

With regard to counsel's comments on "direct" versus "indirect" evidence, the AAO does not use this terminology in its deliberations. The AAO follows the regulations at 8 C.F.R. § 204.5(g)(2) which state that in appropriate cases, other forms of evidence may be submitted.

In response to the director's NOID, counsel submitted the petitioner's reviewed financial statement for the first six months of 2007. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statement that counsel submitted with the petition is not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The AAO also notes that the petitioner's 2007 reviewed financial statement covers only the first six months of the year, and that the petitioner's 2007 financial year could have reflected net current assets that were in variance with the first six months of tax year 2007. For this additional reason, the AAO will not consider the petitioner's reviewed financial statement.

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proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner indicates on its 2006 initial tax return that 11 Schedules K-1 were attached to the return for each person who was a partner at any time during the tax years. The petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

In response to the director's NOID, counsel also submitted a bank statement for the petitioner's February 2007 checking account and the petitioner's savings account with Chase Bank. Counsel's reliance on the two balances in the petitioner's checking and savings accounts for a single month in the priority year is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. This regulation allows additional material "in appropriate cases," and the petitioner in this case has demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable due to the filing of the petition prior to the preparation of the petitioner's 2007 tax return. Counsel also noted that the petitioner started its business operations in October 2006, and that the petitioner's 2006 tax return reflected three months of business and start-up costs. Thus, the petitioner's 2006 tax return could be viewed as painting an inaccurate financial picture of the petitioner.

However, the submission of two bank balances is not sufficient to establish the petitioner's ability to pay the proffered wage during the 2007 priority year. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's savings account statements somehow reflect additional available funds that the petitioner would be willing to use to pay the proffered wage.

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 did not establish that it employed or paid the beneficiary any wages during the relevant period of time. Therefore the petitioner has to establish its ability to pay the entire proffered wage as of the 2007 priority wage onward.

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 (1<sup>st</sup> 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*, 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 a 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 (emphasis added).

The record before the director closed on July 23, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s NOID. As of that date, the petitioner’s 2006 initial federal income tax return is the most recent return available. As stated previously, the AAO will not consider the petitioner’s reviewed financial statement for the first six months of tax year 2007 in its consideration of the petitioner’s ability to pay the proffered wage. The petitioner’s tax return stated its net income as detailed below.

In 2006, the petitioner’s Form 1065 stated net income of -\$70,714.<sup>5</sup>

Therefore, for the year 2006, the petitioner did not establish that it had sufficient net income to pay the proffered wage of \$23,750.

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<sup>5</sup> For a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner’s 2006 Schedule K has no relevant entries for additional deductions, or income in 2006 and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

If the net income the petitioner demonstrates it had available during that 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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 tax returns stated its net current assets as detailed in the table below.

In 2006, the petitioner's Form 1065 stated net current assets of \$67.

Therefore, for the year 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 9089 was accepted for processing by the DOL, 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.

USCIS may consider 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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

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<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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.

In the instant case, the petitioner at the time it filed the I-140 petition has been in business for less than one year. As previously discussed, the petitioner had a significant negative net income in its first three months of operation. While the petitioner's Chase savings account statement indicates savings of \$25,070.54 available as of February 2007, the record does not establish whether these savings would have available to pay the beneficiary's proffered wage in 2007. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO will now examine the issue of the altered Form ETA 9089 and whether the petitioner has established whether the beneficiary is qualified to perform the duties of the proffered position. The AAO finds counsel's assertion that the DOL utilizes procedures not issued under the rule-making procedures of the Administrative Procedures Act and therefore the procedures do not to have the force of law to be non-persuasive in these proceedings. As counsel points out on appeal, the FAQs listed by DOL on its website are the DOL interpretation of its own regulations. The AAO will not discuss this issue further. Contrary to counsel's assertions, the AAO also regards the alterations made to the ETA 9089 to be material to the adjudication of the petition, as will be discussed more fully further in these proceedings.

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.

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. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 9089 was accepted on April 6, 2007.<sup>7</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on June 5, 2007.

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<sup>7</sup> 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 is clear.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, 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 ETA Form 9089, the "job offer" position description for a chef of Italian cuisine provides: "Manage the preparation and cooking of specialty Italian cuisine with emphasis on cuisine from the Veneto and Basilicata. Plan and prepare daily menus, using knowledge of Italian dishes. Order food supplies and manage all kitchen activities."

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

H.4. Education: Minimum level required: The petitioner marked "none."

H-6. Experience: The petitioner indicated 24 months in the position offered.

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).

On the ETA Form 9089, signed by the beneficiary, in Section J-11, the beneficiary represented that the highest level of achieved education related to the requested occupation was "none". In Section J-18, Does the alien have the experience as required or the request job opportunity indicates in question H-6, the petitioner answered "yes." In Section K. Alien Work Experience, the beneficiary indicated that he had worked fulltime for [REDACTED] Italy as a Forest Agent from May 1, 1992 to April 6, 2007. He also indicated that he had worked fulltime for [REDACTED] as a chef from July 15, 1999 to April 30, 1992. The AAO notes that the ETA 9089, as discussed previously, has an initialized correction on the second job description that changes the beneficiary's dates of employment with Ristorante La Pace from the 1989 to 1992 dates to January 1999 to October 2002. The beneficiary, based on counsel's assertions, made these corrections. As stated previously, the petitioner submitted a

letter of work verification written by [REDACTED], the manager of Ristorante La Pace that states that the beneficiary worked fulltime as a cook of Italian cuisine from January 1999 to October 2002.

The AAO views the issue of whether the AAO could have obtained or did obtain a duplicate certified ETA 9089 for the petitioner as both irrelevant and immaterial to the adjudication of the instant petition. Whether utilizing the original dates of employment for Ristorante La Pace listed on the Form ETA 9089, or the corrected dates as initialized by the beneficiary on the Form ETA 9089, the petitioner cannot establish that the beneficiary has the requisite two years of prior work experience as an Italian chef. For example, if the original dates of July 15, 1989 to April 30, 1992 contained on the certified ETA 9089 are considered the beneficiary's actual work experience with Ristorante La Pace, contrary to counsel's assertion, these dates are inconsistent with [REDACTED]'s letter of work verification that states the beneficiary worked there from 1999 to 2002. There is a ten year difference between these two sets of dates. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The petitioner has provided no explanation for why the original dates of employment and the dates outlined in [REDACTED] letter differ.

If the petitioner could utilize the corrected dates on the ETA 9089 that are consistent with the dates provided by [REDACTED] in his letter,<sup>8</sup> the dates of the beneficiary's first documented job with the State Forestry department in Italy and the dates of the beneficiary's claimed corrected dates of work with Ristorante La Pace overlap, which suggests that the beneficiary had two distinct fulltime jobs in two different locations during May 1999 to October 2002. Such employment does not appear plausible. This fact calls into further question the credibility of [REDACTED] letter of work verification, and would significantly undermine any weight to be given to [REDACTED]'s letter.

Based on this examination of the original and corrected claimed dates of employment and the letter of work verification provided by [REDACTED] the petitioner has not established that the beneficiary has the requisite two years of prior work experience stipulated in the Form ETA 9089. For this additional reason, the petition may not be approved.

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 with regard to its ability to pay the proffered wage or with regard to the beneficiary's qualifications to perform the duties of the proffered position.

**ORDER:** The appeal is dismissed.

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<sup>8</sup> The AAO notes that the petitioner cannot use the corrected certified Form ETA 9089 in these proceedings, per DOL guidance in its FAQs discussion on its website. The AAO only discusses the corrected dates for illustrative purposes in its example.