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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:

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LIN 07 037 52713

Office: NEBRASKA SERVICE CENTER

Date: JUN 09 2009

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

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

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, Nebraska 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 cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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. Further the director determined that the petitioner had not established that the proffered position requires at least two years of training or experience as required by 8 C.F.R. § 204.5(l)(4) such that the beneficiary could be found qualified for classification as a skilled worker. The director 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original decision of February 27, 2008, the issues in this case are 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 and whether or not the proffered position requires at least two years of training or experience as required by 8 C.F.R. § 204.5(l)(4) such that the beneficiary could be found qualified for classification as a skilled worker.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is February 5, 2002. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (35 hour week) or \$34,379.80 annually.<sup>1</sup>

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>2</sup>

Relevant evidence submitted on appeal includes a letter, dated March 27, 2008, from [REDACTED] the petitioner's tax preparer, a copy of the petitioner's 2007 Form 1120S, U.S. Income Tax Return for an S Corporation, a copy of the 2007 Form W-2, Wage and Tax Statement, issued by the petitioner on behalf of the beneficiary, and a copy of the petitioner's Form NYS-45-ATT, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return-Attachment, for the third quarter of 2007. Other relevant evidence includes copies of the petitioner's 2002 through 2006 Forms 1120S, copies of the 2002 through 2006 Forms W-2, issued by the petitioner on behalf of the beneficiary, copies of the petitioner's bank balances for the period December 8, 2001 through January 8, 2003,<sup>3</sup> and

<sup>1</sup> The director's decision references a wage of \$39,291.20. This calculation was based on 40 hours per week. However, the labor certification states the hours of work as 35 hours so that the proper annualized wage is \$34,379.80.

<sup>2</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>3</sup> Counsel's reliance on the balances in the petitioner's bank accounts 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. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show

a copy of a pay voucher, issued by the petitioner on behalf of the beneficiary for the period ended October 16, 2007. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2002 and 2007 Forms 1120S reflect ordinary incomes or net incomes of \$9,927, \$18,324, -\$14,213, \$1,087, \$9,694, and \$28,118, respectively. The petitioner's 2002 through 2007 Forms 1120S also reflect net current assets of \$10,813, \$45,115, \$40,977, \$52,889, \$58,594, and \$127,805, respectively.

The 2002 through 2007 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of \$11,190.40, \$11,405.60, \$21,286.80, \$21,600, \$25,400, and \$36,400, respectively.

The pay voucher, issued by the petitioner on behalf of the beneficiary, for the period ended October 16, 2007, reflects year-to-date wages paid to the beneficiary of \$29,400.

The petitioner's 2007 third quarter Form NYS-45-ATT reflects year-to-date wages paid to the beneficiary of \$36,400.

The letter, dated March 27, 2008, from [REDACTED] states:

I am responding on behalf of [the petitioner] to the notice of action Form I-797 regarding their ability to pay the prevailing wage. The beneficiary concerned is [XXX]. For calendar [year] ending 2007, [the petitioner] has paid [the beneficiary] gross wages of \$36,400.00, as can be seen in the enclosed 2007 W-2 Form. In analyzing the 2007 current 1120S federal corporate return, the corporation has generated sales revenue of \$1,103,021.00, and they have paid employee wages to a total of \$154,999.00, which includes [the beneficiary's] wages of \$36,400.00. This shows the corporation has the ability to pay the prevailing wage of \$36,400.00 for [the beneficiary]. In addition, [the petitioner] has over \$147,345.00 in total assets (See 2007, Page 4, Schedule L, Line 15.). This reflects the fact that they can afford to pay the prevailing wage because the business can borrow on the strength of their assets if necessary. This amount is greater than the annual proffered wage of \$36,400.00. Also, [the petitioner] for year end 2007 had a net profit of \$28,118.00 after paying all its operating expenses and officers salaries and employee wages, which shows the corporation has the ability to pay the prevailing wage.

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the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered when determining the petitioner's net current assets. Therefore, the AAO will not consider the petitioner's bank account statements when determining the petitioner's ability to pay the proffered wage of \$34,379.80 from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, counsel asserts:

The decision denying the I-140 petition, filed on November 21, 2007, which sought to classify the beneficiary as an immigrant under Section 203(b)(3)(A) of the Immigration and Nationality Act (the Act) was not based on substantial evidence where such evidence proffered and attached hereto consisting of 2007 income tax returns for the petitioner and the proposed beneficiary establishes petitioner's ability to pay the proposed beneficiary the offered wage of \$18.89 per hour or a yearly salary of \$39,291.20. As reflected by the petitioner's 2007 federal income tax returns, the petitioner has generated sales revenue of \$1,103,021.00 and also paid the proposed beneficiary gross wages of \$36,400.00. In fact, the petitioner included a letter from a tax preparer reflecting the company has over \$147,345.00 in total assets. Despite a lengthy denial, the decision makes no reference to these documents.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, the beneficiary claims to have been employed by the petitioner from April 1997 to the present. In addition, counsel has submitted the 2002 through 2007 Forms W-2, issued by the petitioner on behalf of the beneficiary, which corroborate the beneficiary's claims of employment with the petitioner in the pertinent years (2002 through 2007).

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$34,379.80 and the actual wages paid to the beneficiary in 2002 through 2006.

<u>Year</u>	<u>W-2 Wages Paid</u>	<u>Difference Between Proffered Wage And W-2 Wages Paid</u>
2002	\$11,190.40	\$23,189.40

2003	\$11,405.60	\$22,974.20
2004	\$21,286.80	\$13,093.00
2005	\$21,600.00	\$12,779.80
2006	\$25,400.00	\$ 8,979.80
2007 <sup>4</sup>	\$36,400.00	\$ 2,020.20+

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as 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 federal case law. *See 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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*, 719 F. Supp. at 537.

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 (1997-2003), line 17e (2004-2005) of Schedule K, or line 18 (2006). *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating

<sup>4</sup> It is noted that the petitioner paid the beneficiary \$36,400, or \$2,020.20 more than the proffered wage of \$34,379.80 in 2007. Therefore, the petitioner has established its ability to pay the proffered wage of \$34,379.80 in 2007 by actually paying the beneficiary more than the proffered wage.

that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have any additional 2002 through 2006 income and deductions shown on its Schedule K, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S for 2002 through 2006.

In the instant case, the petitioner's net incomes for 2002 through 2006 were \$9,927, \$18,324, -\$14,213, \$1,087, and \$9,694, respectively. The petitioner could have paid the difference of \$8,979.80 between the proffered wage of \$34,379.80 and the actual wages paid to the beneficiary of \$25,400 from its net income in 2006. The petitioner could not have paid the difference of \$23,189.40 in 2002, \$22,974.20 in 2003, \$13,093 in 2004, and \$12,779.80 in 2005 between the proffered wage of \$34,379.80 and the actual wages paid to the beneficiary of \$11,190.40 in 2002, \$22,974.20 in 2003, \$13,093 in 2004, and \$12,779.80 in 2005 from its net incomes in 2002 through 2005. Therefore, the petitioner has established its ability to pay the proffered wage of \$34,379.80 in 2006 from its net income, but not in 2002 through 2005.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. 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.<sup>5</sup> 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's 2002 through 2005 net current assets were \$10,813, \$45,115, \$40,977, and \$52,889, respectively. The petitioner could have paid the difference of \$22,974.20 in 2003, \$13,093 in 2004, and \$12,779.80 in 2005 between the proffered wage of \$34,379.80 and the actual wages paid to the beneficiary of \$22,974.20 in 2003, \$13,093 in 2004, and \$12,779.80 in 2005 from its net current assets in 2003 through 2005. The petitioner could not have paid the difference of \$23,189.40 between the proffered wage of \$34,379.80 and the actual wage paid to the beneficiary of \$11,190.40 in 2002 from its net current assets in 2002. Therefore,

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<sup>5</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the petitioner has established its ability to pay the proffered wage in 2003 through 2007, but not in the year of the priority date of 2002.

On appeal, counsel cites to only 2007 evidence, and claims that the petitioner has established its ability to pay the proffered wage based on its 2007 federal income tax returns, the wages paid to the beneficiary in 2007, and the petitioner's total assets in 2007.

Counsel is mistaken. While the petitioner has established its ability to pay the proffered wage of \$34,379.80 in 2007 by actually paying the beneficiary more than the proffered wage in 2007, the petitioner is obligated to establish that it had sufficient funds to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In the instant case, the petitioner has not established its ability to pay the proffered wage in 2002, the year of the priority date.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a 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 that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 1997. The petitioner has provided tax returns for 2002 through 2007 with all but one (2002) of the tax returns establishing the

petitioner's ability to pay the proffered wage of \$34,379.80.<sup>6</sup> Therefore, in light of the petitioner's long and continuing business presence (more than 10 years), its steadily increasing gross receipts, its increase in wages to both the beneficiary, as well as all employees, and its increase in officers' compensation, the AAO finds that the petitioner could pay the proffered wage from the priority date and continuing to the present. This part of the director's decision is overcome.

The second issue in this case is whether or not the petitioner has established that the position requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Here, the Form I-140 was filed with USCIS on November 21, 2006. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The regulation at 8 C.F.R. 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

(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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt

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<sup>6</sup> It is noted that even when adding the petitioner's net current assets of \$10,813 and the wages paid to the beneficiary of \$11,190.40 in 2002, the total is \$22,003.40, or \$12,376.40 less than the proffered wage of \$34,379.80.

in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is February 5, 2002.

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, 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).

In this case, the ETA Form 750, Application for Alien Employment Certification, as certified, indicates that there are no education, training, or experience requirements in the job offered of cook for the proffered position. Accordingly, based on the labor certification requirements, as certified, the petitioner could only file the I-140 under 2 "g" for an "other worker" requiring less than two years of training or experience. However, the petitioner requested the skilled/professional worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition, select the proper category, and submit the proper fee and required documentation.

The evidence submitted does not establish that the position requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. Accordingly, the petition was properly denied.

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.