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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  
and Immigration  
Services**

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FILE: [REDACTED]  
LIN 08 155 50846

Office: NEBRASKA SERVICE CENTER

Date:

OCT 06 2009

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

**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).

Perry J. Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant 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 seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other worker. The director determined that the petitioner failed to submit the initial required evidence pursuant to 8 C.F.R. § 103.2(b). The director denied the petition, accordingly pursuant to 8 C.F.R. § 103.2(b)(8)(ii).

The director denied the visa petition as the petitioner failed to submit any evidence of its continuing ability to pay the proffered wage and of the beneficiary's experience. However, the visa petition should also have been denied as the petitioner selected the wrong job category on the Form I-140 Petition, Petition for Alien Worker, under Part 2, Petition type.<sup>1</sup>

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<sup>1</sup> 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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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.

Here, the Form I-140 was filed with U.S. Citizenship and Immigration Services (USCIS) on April 30, 2008. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for an other worker.

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. (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)).

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

On appeal, the petitioner stated:

It has been confirmed by an officer at the immigration auto[matic] inquiry system, that it is and has been a common, past practice of the Service Centers to

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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.

In this case, the Form ETA 750, Application for Alien Employment Certification, indicates that the requirements are three years of experience in the position offered of restaurant cook. Accordingly, based on the labor certification requirements, the petitioner could only file the I-140 petition under the 2 “e” category for a “skilled worker” requiring a minimum of two years of training or experience. However, the petitioner requested the other 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 box, and submit the proper fee and required documentation.

The evidence submitted does not establish that the petition requires less than two years of training or experience such that the beneficiary may be found qualified for classification as an other worker.

ask for any additional information relevant to the application submitted, and not to just deny it. It is the past practice of the Service Centers to allow the petitioner additional time within which to send requested evidence.

Therefore, I believe that the denial was in error.

I will submit information/evidence within 30 days from the date of this Form I-290B.

On appeal, the petitioner submitted a copy of a Request for Evidence (RFE) related to another case to show that the Service Center does issue RFE's, a copy of a School Certification, dated June 5, 2008, showing that the beneficiary finished elementary school (1990 through 1996), a statement, dated February 27, 2009, from [REDACTED] copies of the 2004 through 2008 financial statements for TNF, LLP, copies of the 2001 through 2003 financial statements for [REDACTED] and copies of the 2001 through 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation, for [REDACTED]

The statement, dated February 27, 2009, from [REDACTED] states:

This is to verify that [the beneficiary] worked for me at the [REDACTED] on [REDACTED]. He worked there from August 1998 until August 1999 as a cook.

The duties [the beneficiary] preformed [sic] as cook are as follows: Involved will all kitchen personnel in preparation and cooking of all menu items. He would estimate how much food to be ordered and purchased food as required. He made sure the supplies were up to my standards, maintaining the inventory. [The beneficiary] also developed recipes based on the type of food featured and

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<sup>2</sup> 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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Therefore, the AAO will not consider the unaudited financial statements for [REDACTED] or TNF, LLC except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

prepared special Greek, Latin, and American dishes. He did all baking of bread, Greek desserts and preparation of sauces, vegetables, and soups. [The beneficiary] had personal knowledge and experience and applied it to his work.

The 2001 through 2003 Forms 1120S for [REDACTED] reflect ordinary incomes or net incomes of -\$5,803, -\$27,435, and -\$14,277, respectively. The 2001 through 2003 Forms 1120S for [REDACTED] also reflect net ordinary incomes of -\$4,494, \$0, and \$0, respectively.

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

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<sup>3</sup> The AAO notes that the labor certification, Form ETA 750, was filed by [REDACTED] [Employer Identification Number (EIN) [REDACTED], according to the 2001 through 2003 Forms 1120S], while the petition was filed by [REDACTED] EIN [REDACTED], according to Form I-140, Immigrant Petition for Alien Worker. As the two entities have separate tax identification numbers, they would be separate companies. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In addition, the website for the Wisconsin Department of Financial Institutions Corporate Records, for entity ID [REDACTED] accessed on September 28, 2009, [https://www.wdfi.org/apps/CorpSearch/Details.aspx?entityID=\[REDACTED\]](https://www.wdfi.org/apps/CorpSearch/Details.aspx?entityID=[REDACTED]) shows that [REDACTED] was dissolved on April 27, 2004, and the petitioner has not submitted any evidence that it is a successor-in-interest to [REDACTED]. A successor-in-interest occurs when the prospective employer of an alien (and the entity that filed the certified labor certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change such as corporate restructuring or merger with another business entity, and the new or merged, or restructured entity assumes substantially all the rights, duties, obligations, and assets of the original entity. The petitioner must submit evidence of the change in ownership, the restructuring of the organization, or merger, evidence that the predecessor company had the ability to pay the wage at the time the application for labor certification was filed, and evidence that the successor company continues to have that ability. Moreover, as a successor-in-interest, the petitioner is required to establish that it had the continuing financial ability to have paid the certified wage from the purchase date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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 May 1, 2001. The proffered wage as stated on the Form ETA 750 is \$8.38 per hour or \$17,430.40 annually.

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>4</sup>

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 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 during any relevant timeframe including the period from the priority date in 2001 or subsequently through 2008.

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<sup>4</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).

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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

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 [REDACTED] tax returns demonstrate its net income for 2001 through 2003, as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>5</sup> of -\$5,803.
- In 2002, the Form 1120S stated net income of -\$27,435.
- In 2003, the Form 1120S stated net income of -\$14,277.

Therefore, for the years 2001 through 2003, [REDACTED] did not have sufficient net income to pay the proffered wage of \$17,430.40.<sup>6</sup>

The petitioner failed to submit its 2004 through 2008 income tax returns, and therefore, has not established its ability to pay the proffered wage in 2004 through 2008. *See* footnote two.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</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 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. [REDACTED]'s tax returns demonstrate its end-of-year net current assets for 2001 through 2003, as shown below.

- In 2001, the Form 1120S stated net current assets of -\$4,494.
- In 2002, the Form 1120S stated net current assets of \$0.
- In 2003, the Form 1120S stated net current assets of \$0.

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<sup>5</sup> 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) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because [REDACTED] did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001 through 2003, the petitioner's net income is found on line 21 of page one of their 2001 through 2003 tax returns.

<sup>6</sup> Additionally, the petitioner would need to establish that [REDACTED] and [REDACTED] are the same company or establish a valid successor-in-interest relationship in order to use the financial evidence of [REDACTED] for the petitioner. *See* footnote 3.

<sup>7</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.

Therefore, for the years 2001 through 2003, [REDACTED] did not have sufficient net current assets to pay the proffered wage of \$17,430.40.

The petitioner failed to submit its 2004 through 2008 income tax returns, and therefore, has not established its ability to pay the proffered wage in 2004 through 2008 from its net current assets. See footnote two.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, 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 Sonogawa*, 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 [REDACTED]'s tax returns indicate it was incorporated on December 15, 1995. The petitioner has provided [REDACTED] tax returns for 2001 through 2003, with none of the tax returns establishing [REDACTED] ability to pay the proffered wage of \$17,430.40. In addition, the petitioner has not submitted its 2004 through 2008 tax returns or shown that it is a successor-in-interest to [REDACTED]. Therefore, the petitioner has not established the ability to pay the proffered wage in 2001 through 2008. The AAO is unable to approve a petition without probative evidence that clearly shows that the previous owner and the current owner had the ability to pay the proffered wage in 2001 through 2008. In addition, [REDACTED] tax returns are not enough evidence to establish that the prior business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the prior owner's or current owner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Thus, assessing the totality of the circumstances in this individual case, it is

concluded that the petitioner has not established that it or [REDACTED] had the continuing ability to pay the proffered wage.

With the initial petition, the petitioner was obligated to show that the beneficiary met the experience requirements of the labor certification as of the priority date of May 1, 2001.

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 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 May 1, 2001.

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).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess three years of experience in the job offered of restaurant cook. Block 15 does not state any additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of restaurant cook must have three years of experience in the job offered.

On the Form ETA 750B under "Work Experience," the beneficiary signed, under penalty of perjury, on April 30, 2001 that he had been employed from June 1998 through August 1999 as a chief cook with [REDACTED] and [REDACTED]. The beneficiary does not list any additional work experience on the Form ETA 750B.

In the instant case, the petitioner submitted a statement, dated February 27, 2009, from [REDACTED] who states that the beneficiary was employed by [REDACTED] from August 1998 until August 1999 as a cook. The statement was not on [REDACTED] letterhead and does not include [REDACTED] address or title. Therefore, the statement does not meet the regulation regarding submitting initial evidence at 8 C.F.R. § 204.5(g)(1) which states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In the instant case, the petitioner did not claim that the required documentation was unavailable. In addition, the statement only establishes that the beneficiary was employed by [REDACTED] for one year, not the three years required by the labor certification. Therefore, the petitioner has not established that the beneficiary met the three-year experience requirement of the labor certification at the time of filing of the labor certification.

On appeal, the petitioner stated that it had confirmed that it is past practice for the Service Centers to request additional information relevant to the application and not to just deny it. However, as the petitioner failed to submit the required initial evidence, the director was not obligated to issue a request for evidence.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

*Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence with the petition, and therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's and beneficiary's eligibility.

As the petitioner has filed under the wrong visa category, has not established that it is a successor-in-interest to [REDACTED], has not established [REDACTED] continuing ability to pay the proffered wage from the priority date of May 1, 2001 until the

petitioner became owner, has not established its continuing ability to pay the proffered wage from the time it purchased [REDACTED] and continuing to the present, and has not established that the beneficiary met the experience requirements of the labor certification, the visa petition may not be approved, and the director's decision must be affirmed.

For the reasons discussed above, the assertions of the petitioner on appeal do not overcome the decision of the director.

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.