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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**

B6

[Redacted]

FILE: [Redacted]

Office: TEXAS SERVICE CENTER

Date:

**DEC 03 2010**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

The *Elizabeth McCormack*

Perry Rhew  
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 The director's decision will be withdrawn and the petition will be remanded for further action and entry of a new decision.

The petitioner claims to operate and manage a hotel and catering business. It seeks to employ the beneficiary permanently in the United States as a banquet captain supervisor. As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by an ETA Form 750, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the petition. 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 28, 2009 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 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 labor certification was accepted for processing by 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 the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the labor certification was originally filed with the DOL on April 30, 2001. The proffered wage stated on the labor certification is \$15.00 per hour (\$31,200.00 per year). The approved labor certification application states that the position requires 2 years of experience in the job offered or 2

years in a related occupation as an assistant chef or in the hospitality industry with a management background.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The evidence in the record of proceeding includes copies of the petitioner's Forms 1120S, U.S. Corporation Income Tax Returns, for 2001 through 2006; the beneficiary's IRS Forms W-2 for 2001 through 2008;<sup>2</sup> and a letter dated January 15, 2008 from the petitioner's Director of Catering stating that the beneficiary was employed by the petitioner since April of 1997.

The petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on March 7, 1997, to have a gross annual income of \$5,720,000.00, and to currently employ 90 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claims to have worked as a banquet catering supervisor for the petitioner since June 1998.

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

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed and paid the beneficiary during the required 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered

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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 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 evidence before the director did not include the beneficiary's Forms W-2. The Forms W-2 will be considered on appeal under the AAO's *de novo* review authority.

wage for the required period, the petitioner is obligated to establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

The record before the director closed on June 17, 2008 with the receipt by the director of the Form I-140 petition and accompanying evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. The AAO's review of the petitioner's tax returns will be limited to the 2001 through 2006 IRS Forms 1120S submitted to the director. On appeal, the petitioner submits IRS Forms W-2 issued to the beneficiary in 2007 and 2008, which will be considered.

The proffered wage is \$31,200.00. The record of proceeding contains copies of IRS Forms W-2 that the petitioner issued to the beneficiary for the 2001 through 2008 tax years as shown in the table below.

- In 2001, the Form W-2 stated total wages of \$31,170.75, (\$29.25 less than the proffered wage).
- In 2002, the Form W-2 stated total wages of \$31,997.88.
- In 2003, the Form W-2 stated total wages of \$30,626.76, (\$573.24 less than the proffered wage).
- In 2004, the Form W-2 stated total wages of \$36,636.08.
- In 2005, the Form W-2 stated total wages of \$36,478.15.
- In 2006, the Form W-2 stated total wages of \$36,687.82.
- In 2007, the Form W-2 stated total wages of \$39,779.28.
- In 2008, the Form W-2 stated total wages of \$37,352.34.

Although the petitioner has demonstrated its ability to pay the proffered wage in 2002, 2004, 2005, 2006, 2007, and 2008 because it already paid the beneficiary wages in excess of the proffered wage, it is obligated to show that it can pay the difference between the proffered wage and wages already paid in 2001 and 2003.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the required 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, 881 (E.D. Mich. 2010) (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. “[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 petitioner’s IRS 1120S tax returns demonstrate its net income for 2001 and 2003, as shown in the table below.

- In 2001, the Form 1120S<sup>3</sup> stated net income of \$2.00.

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<sup>3</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); and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a

- In 2003, the Form 1120S stated net income of \$0.00.

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages actually paid to the beneficiary.

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>4</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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 and 2005, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of (\$89,950.00).
- In 2003, the Form 1120S stated net current assets of (\$14,503.00).

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary.

On appeal, counsel asserts that the evidence demonstrates that the petitioner has paid sufficient wages to the beneficiary, and that any difference in amounts actually paid and the proffered wage amounts can be realized through the petitioner's gross receipts and payroll amounts recorded for the relevant years. The director noted that the petitioner submitted copies of the beneficiary's Forms 1040, U.S. Individual Income Tax Returns for 2001, 2002, 2003, 2004, 2005, and 2006; however, without the beneficiary's IRS Forms W-2, Wage and Tax Statements for those years, the director was not able to determine whether the adjusted gross income amounts that were reported on line 37 of the Forms 1040 were paid by the petitioner to the beneficiary. On appeal, the petitioner submits copies of the Forms W-2 it issued to the beneficiary for the relevant years.

Although the Forms W-2 demonstrate the petitioner's ability to pay the proffered wage in 2002, 2004, 2005, 2006, 2007, and 2008; for the years 2001 and 2003, the petitioner did not equal or exceed the proffered wage in payment of wages to the beneficiary and did not have sufficient net income or current assets to pay the difference between wages already paid and the proffered wage. Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary

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summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Where the petitioner has additional entries on its Schedules K, the petitioner's net income is found on Schedule K of its tax returns. In this matter, the net income was taken from Schedule K.

<sup>4</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.

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.

Counsel asserts on appeal that the director failed to take the totality of the circumstances into consideration in determining the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel submits the year-end 2003 unaudited financial statement of the petitioner and a copy of an email from the controller of the petitioning entity in which the controller asserts that the petitioner's tax planning strategy results in a net income figure of zero at year's end, despite the operating profit of \$248,758.92 reflected on the 2003 financial statement. The controller's email suggests that the petitioner's tax returns thus do not accurately reflect the petitioner's true financial status. As noted above, USCIS' 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)). The petitioner has not demonstrated that the figures for net income and net current assets reflected on the 2001 and 2003 tax returns were in error or that it has filed amended returns to correct any error. The AAO will rely on the figures that the petitioner reported to the Internal Revenue Service, and not on the 2003 unaudited financial statement of the company.

Further, the petitioner has not established through the submission of a 2003 unaudited financial statement that its tax returns do not accurately reflect its financial condition for that year or 2001. 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. As there is no accountant's report accompanying the 2003 financial statement, the AAO cannot conclude that it is an audited statement. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate that the petitioner's tax returns do not accurately reflect its financial status.

Counsel asserts that the petitioner has been in business since March of 1997; that the petitioner's average gross receipts each year have exceeded \$1 million; and that each year the petitioner paid more than \$1 million in total wages and salaries. Counsel infers that despite the loss for the 2003 tax year, the gross receipts in that same year were substantial.

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

The petitioner's tax returns indicate that it consistently has annual gross receipts upwards of \$4.5 million and pays annual wages of \$1.5 million or more. The record indicates that the petitioner has been in business since 1997 and employs 90 workers. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*, 12 I&N Dec. 612. The petitioner has paid the beneficiary the full proffered wage in 2002 and from 2004 through 2008, and has paid all of the proffered wage but \$29.25 in 2001 and \$573.24 in 2003, which are nominal amounts considering the other significantly favorable factors such as wages the petitioner already paid to the beneficiary, and the petitioner's gross receipts and annual wage payments to its 90 employees. A review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The evidence submitted establishes that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage through 2008.

The petition may not be approved, however, as the record does not establish that the beneficiary is qualified for the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the labor certification application was accepted on April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor

certification. 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 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 requirements for the proffered position of banquet captain supervisor are set forth in Part 14 of the Form ETA 750. That section states that the applicant must have two years of experience in the job offered or two years as an assistant chef or in the hospitality industry with a management background. However, the record is significantly incomplete as it does not contain an attachment referred to in Part 13 of the Form ETA 750 Part A. Thus, it is impossible to ascertain the specific duties required by the proffered position.

Additionally, in order to establish that the beneficiary has the necessary experience in the job offered by the priority date, the petitioner must submit "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." 8 C.F.R. § 204.5(l)(3)(ii)(A). Furthermore, 8 C.F.R. § 204.5(g)(1) requires such letters to include a "specific description of the duties performed by the alien."

In support of the beneficiary's qualifications, the petitioner submitted a letter dated January 15, 2008 signed by the petitioner's Director of Catering, who states that the petitioner has employed the beneficiary since April 10, 1997 as a banquet supervisor. On the Form ETA 750, which the beneficiary signed under penalty of perjury, the beneficiary indicated that he began employment with the petitioner in June of 1998. On the G-325A signed by the beneficiary in May, 1988 and submitted in connection with his application to adjust status or to register permanent residence (Form I-485), the beneficiary stated that he started work with the petitioner in April, 1997. There is no evidence of record to resolve these inconsistencies. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record does not contain a letter complying with the applicable regulatory provisions that demonstrates that the beneficiary has the qualifying employment experience. Additionally, the inconsistencies in the record regarding the start date of the beneficiary's employment with the petitioner require clarification and explanation through objective supporting evidence. Further, the only description in the record of the duties that the beneficiary performs as a banquet captain supervisor are those listed by the beneficiary on the Form ETA 750B where he indicated the duties he has performed for the petitioner since June, 1998. Neither the labor certification application nor the January 15, 2008 letter from the petitioner's Director of Catering describes the beneficiary's duties as a banquet captain supervisor. Without a description of the duties required of the position,

the AAO is unable to determine whether the beneficiary was qualified to perform those duties as of the filing date of the Form ETA 750. As the record does not establish that the beneficiary had the qualifications stated on the Form ETA 750 as of the priority date, the petition will be remanded in order for the director to resolve the issue.

On remand, the director should request the petitioner to submit a copy of the attachment to the Form ETA 750A, part 13, describing the duties of the position as certified by the DOL<sup>6</sup> and any correspondence between the petitioner and DOL during the labor certification process<sup>7</sup>; and a revised letter complying with the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), including the name, address, and title of the signatory, and indicating the duties performed by the beneficiary demonstrating qualifying employment experience according to the requirements of the job offer. The director should also direct the petitioner to resolve the inconsistencies about the represented information about the beneficiary's prior employment history by submitting Forms W-2, I-9 forms, 1099-MISC, and/or tax, human resources, or payroll records establishing the exact periods of prior qualifying employment. The director may request any additional evidence considered pertinent to the beneficiary's qualifications.

On remand, the director should also request the petitioner to submit evidence of the petitioner's ability to pay from 2009 through the present. As noted above, the regulation 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The director shall give the petitioner a reasonable period of time to respond to the request for evidence. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is

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<sup>6</sup> If a copy of the original Form ETA 750 part 13 attachment describing the duties of the position is unavailable, the petitioner must establish such unavailability before secondary evidence may be considered. See 8 C.F.R. § 103.3(b)(2).

<sup>7</sup> The AAO notes that the regulation 20 C.F.R. § 656.21(b)(5) requires that the employer document that its requirements for the job opportunity represent the employer's actual minimum requirements for the job opportunity, and that the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. If the beneficiary obtained his qualifying employment experience with the petitioner, it may have disadvantaged applicants without a similar opportunity to demonstrate their qualifications.

remanded to the director for issuance of a new, detailed decision. Should the decision be adverse to the petitioner, the decision shall be certified to the AAO for review.