

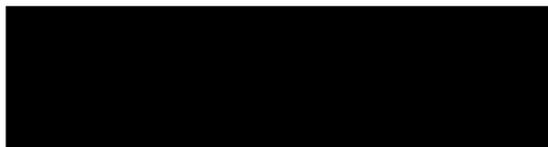
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



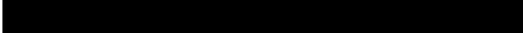
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FILE: 

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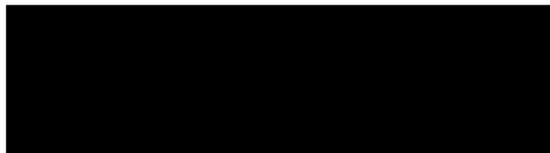
Date:

DEC 08 2010

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.

Thank you,

Perry Rhew
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 foreign food chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 from the priority date of the visa petition onwards. 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 17, 2008 denial, at issue in this case is whether 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), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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 Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$15.33 per hour (\$31,886.40 per year). The Form ETA 750 states that the position requires two years of experience in the proffered job or the related occupation of Sushi Chef/Cook.

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 on appeal.¹

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner stated that it was established in 2000 and that it currently employs 12 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 March 1, 2001, the beneficiary claimed to have worked for the petitioner from January 2001 through the date that he signed that form.

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, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Here, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or any portion of the wage at any time during the relevant period of analysis.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 (1st Cir. 2009). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 879 (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.

¹ 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 this 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).

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 not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service (INS), 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 at 881 (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 record before the director closed on November 16, 2007 with the receipt of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's 2001 through 2006 tax returns reflect its net income as follows:

- The 2001 Form 1120S states a net income (loss)² of -\$78,810.
- The 2002 Form 1120S states a net income (loss) of -\$43,186.
- The 2003 Form 1120S states a net income (loss) of -\$29,062.
- The 2004 Form 1120S states a net income (loss) of -\$39,692.
- The 2005 Form 1120S states a net income (loss) of -\$69,494.
- The 2006 Form 1120S states a net income (loss) of -\$2,766.

For the years 2001 through 2006, the petitioner suffered a net loss. Thus, the petitioner has not shown that it had sufficient net income to pay the proffered wage or the difference between the actual wage that it paid the beneficiary, if any, and the proffered wage in those years.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 reflect its end-of-year net current assets for 2001 through 2006, as:

- The 2001 Form 1120S states net current assets (liabilities) of -\$15,573.
- The 2002 Form 1120S states net current assets (liabilities) of -\$20,074.
- The 2003 Form 1120S states net current assets (liabilities) of -\$29,062.
- The 2004 Form 1120S states net current assets of \$25,441.
- The 2005 Form 1120S states net current assets of \$4,833.
- The 2006 Form 1120S states net current assets (liabilities) of \$7,522.

² 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 (2001-2003) line 17e (2004-2005) and line 18 (2006) of the Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 29, 2010) (indicating 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 additional income and other adjustments shown on its Schedule K during any year in the relevant period, the petitioner's net income is found on page one, line 21 of the Form 1120S on its 2001-2006 tax returns.

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

For the years 2001 through 2003, the petitioner had negative net current assets. Thus, it has not established that it had sufficient net current assets in those years to cover the portion of the proffered wage that it did not pay the beneficiary in those years, if any, or the full proffered wage. For the years, 2004 through 2006, the petitioner had net current assets below the proffered wage. Also, the petitioner has not documented that it paid the beneficiary any wages in those years. Thus, it has not shown that in 2004 through 2006, it had the ability to pay the full proffered wage or the portion of the wage that it did not pay the beneficiary, if any, in those years.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel indicated that total salaries paid during the relevant period, as documented in the record, demonstrate the petitioner's ability to pay the wage. This is not correct. As stated previously, showing that the petitioner paid wages in excess of the proffered wage is not sufficient. The petitioner must demonstrate that it had funds available to pay the proffered wage throughout the relevant period. See 8 C.F.R. § 204.5(g)(2). Moreover, the wages on the Forms W-2, Wage and Tax Statement, issued by the petitioner in each year are combined on the Forms W-3, Transmittal of Wage and Tax Statements; however, the total Form W-2 wages paid by the petitioner in each year as listed on the Forms W-3 in the record are not reflected anywhere on the petitioner's corresponding tax returns. Such discrepancies in the record cast doubt on all of the petitioner's evidence.

Doubt cast on any aspect of the proof submitted by an applicant or petitioner may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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. See *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Any assertion made in this case that USCIS should view the fact that the petitioner's gross income far exceeds the proffered wage as evidence that the petitioner has the ability to pay that wage is not persuasive. As noted earlier, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court specifically rejected the argument that INS, now USCIS, should have considered income before expenses were paid rather than net income. See also *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (which indicates that gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

Also, the director correctly indicated in his denial that Hurricane Katrina (Katrina) may well have negatively affected the petitioner's business in 2005; however, the petitioner still must show it had an ability to pay the wage from the 2001 priority date year until the time of Katrina and that it regained that ability subsequent to that hurricane. Counsel's suggestion that the fact that the petitioner continued on as a viable business after Katrina demonstrates that it has had the continuing ability to pay the wage from 2001 onwards is without merit.

In addition, any suggestion made in these proceedings that USCIS should consider items found on

the Schedule L (such as total assets, mortgages, notes, etc. payable in one year or more, or shareholders' equity) other than the petitioner's current assets listed at 1(d) through 6(d) as funds available to pay the wage is misplaced. As stated earlier, *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000) specifies that "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. Current assets are found at 1(d) through 6(d) of the Schedule L and current liabilities are at 16(d) through 18(d). Other assets listed on the Schedule L are not expected to have a life of one year or less, and other liabilities are not obligations expected to be payable within one year. Thus, contrary to assertions made by counsel throughout these proceedings, net current assets are calculated by subtracting current liabilities from current assets.

Further, any assertion that the petitioner's bank statements in the record demonstrate the petitioner's ability to pay the proffered wage from the priority date onwards is not persuasive. First, bank statements are not among the three types of evidence, enumerated at 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 evidentiary material "in appropriate cases," here counsel and the petitioner have not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable 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 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 denote additional available funds that were not reflected on its tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets.

USCIS may also 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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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.

Here, the record indicates that the petitioner incorporated in 2000 and that it currently employs 12 workers. The petitioner has not established its historical growth since incorporating. Its gross sales or receipts have not consistently increased, but have fluctuated during the relevant period of analysis. Further, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses. It has not provided any independent, objective evidence of its reputation within its industry. The petitioner has not provided documentation which demonstrates that the beneficiary will be replacing former employee(s) or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not established that the beneficiary had the experience needed to perform the duties of the proffered position as of the priority date. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the beneficiary'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 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 Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of foreign food chef. Here, item 14 indicates that there are no educational requirements for the position. Item 14 states that the applicant must have two years of experience in the job offered or in the related position of sushi chef/cook. The duties of the proffered job are listed at Item 13 of the Form ETA 750A as: "Will plan, prepare, decorate, and serve traditional Japanese sushi, sahim, and rice rolls for Japanese restaurant. Will supervise six employees." Item 15 of the Form ETA 750A indicates that the applicant must be available to work from 10:30 a.m. to 2:30 p.m. and 6 p.m. to 10 p.m. as well as various other schedules that are not specified. Item 15 does not list any other special requirements.

The beneficiary set forth his credentials on the Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part 15, where the beneficiary is required to list any work experience relevant to the proffered position, he stated that from January 2001 through the date that he signed that form in March 2001, he worked for the petitioner as a sushi chef. He also stated that from January 1993 to May 1993, from July 1994 to July 1995 and from October 1996 to August 1997, he worked as a sushi chef at [REDACTED]

The beneficiary did not provide any additional information concerning his employment background that is relevant to the proffered position on that form.

The petitioner submitted into the record a letter which appears to have been written on [REDACTED] letterhead stationery by the owner and general manager of the restaurant; yet, the letter, including the letterhead, is written in English, not Japanese. The letter states that the beneficiary worked at this restaurant as a sushi chef/cook from January 18, 1998 until May 20, 1993, from July 10, 1994 until July 2, 1995 and from October 20, 1996 until August 1, 1997. The letter does not set forth any description of the beneficiary's experience or duties in this position. The petitioner did not submit any additional evidence to support its claim that the beneficiary was qualified to perform the duties of the proffered position as of the priority date.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

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

The petitioner did not submit any letter signed by one of the beneficiary's former employers which gives a description of the beneficiary's experience that correlates with the duties of the proffered position or the related position of sushi chef/cook as required at 8 C.F.R. § 204.5(l)(3). It submitted an experience letter that refers only to the beneficiary's title while working at [REDACTED]

Moreover, even though this previous employer, [REDACTED] is stated to be a sushi restaurant located in Japan, the wording on its letterhead stationery appears only in English, not in Japanese. The body of the letter is also written in English. This discrepancy in the record calls the authenticity of the experience letter into question. It also calls the remaining evidence in the record into question. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988)(which indicates that doubt cast on any aspect of the proof submitted may lead to a reevaluation of the reliability and sufficiency

of the remaining evidence offered in support of the petition; and that is incumbent upon the petitioner to resolve inconsistencies in the record by independent objective evidence.)

Thus, the petitioner has not provided detailed, credible evidence to support its claim that, as of the priority date, the beneficiary had the necessary qualifications for the proffered position as stated on the Form ETA 750; namely, the petitioner failed to sufficiently document that the beneficiary had acquired two years of experience in the proffered position or in the related position of sushi chef/cook, as of the April 16, 2001 priority date.

In sum, the petitioner has not shown that the beneficiary was qualified as of the priority date to perform the duties of the proffered position as those qualifications are defined on the Form ETA 750. The petitioner has also failed to show the continuing ability to pay the proffered wage from the priority date onwards. The appeal must be dismissed on both of these grounds, with each considered an independent and alternative basis of dismissal.

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.