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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 28 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. Please refer to 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a domestic limited liability company. It seeks to employ the beneficiary permanently in the United States as a fast food grill cook. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 5, 2008 denial, the 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), 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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 24, 2000. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour (\$16,640 per year). The Form ETA 750 further states that the beneficiary will work three hours of overtime per week at \$10.50 per hour. Considering overtime the annual

proffered wage would be \$18,278. The Form ETA 750 states that the position requires two years experience in the proffered position.

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.¹

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established on April 4, 1994 and to currently employ 24 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on August 24, 1999, the beneficiary claimed to have worked for the petitioner from July 1996 until the signature date.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States 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

¹ 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).

² A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted W-2 Forms to show wages paid to the beneficiary during relevant periods as follows:

- In 2000, the petitioner (tax id – [REDACTED]) paid the beneficiary wages of \$17,160.00.
- In 2001, the petitioner (tax id – [REDACTED]) paid the beneficiary wages of \$15,720.54.
- In 2002, the petitioner (tax id – [REDACTED]) paid the beneficiary wages of \$20,921.92.
- In 2003, the petitioner (tax id – [REDACTED]) paid the beneficiary wages of \$24,949.04.

The petitioner's W-2 Forms show that it paid the beneficiary more than the proffered wage plus applicable overtime (\$18,278) in 2002 and 2003. In 2000 and 2001, the petitioner paid the beneficiary less than the proffered wage plus applicable overtime. The petitioner will, therefore, have to establish the ability to pay the difference between the proffered wage plus applicable overtime in those years. Those sums are as follows:

- 2001 - \$1,118.00.
- 2002 - \$2,557.46.

The petitioner submitted W-2 Forms from [REDACTED] showing wages paid to the beneficiary as follows:

- In 2004, [REDACTED] paid the beneficiary wages of \$13,872.20.
- In 2005, [REDACTED] paid the beneficiary wages of \$27,054.99.
- In 2006, [REDACTED] paid the beneficiary wages of \$28,638.36.

The wages paid to the beneficiary by [REDACTED] however, may not be considered. As stated by the petitioner on appeal, [REDACTED] is the parent company of the petitioner. The petitioner submitted management services agreements between the petitioner and [REDACTED] dated September 26, 1996 and September 20, 2002. In 1996, the petitioner did business under the name of [REDACTED]. According to records of the NYS Department of State, Division of Corporations (http://www.dos.state.ny.us/corps/bus_entity_search.html), [REDACTED] changed its name to that of the present petitioner [REDACTED] retained the same tax identification number as [REDACTED]. Under the terms of those management services agreements with [REDACTED] would:

- Manage all day-to-day operations of the [REDACTED] restaurants;
- Manage all Human Resource needs of the petitioner;
- Manage all marketing needs of the petitioner;
- Manage all maintenance and repair needs of the petitioner;
- Manage all financial needs of the petitioner;
- Maintain the necessary and required relationships with the franchisor and ensure compliance with the petitioner's franchise agreement.

[REDACTED] however, is a separate legal entity from the petitioner, with a separate tax id number. The record does not establish that it is the same entity as the petitioner and, as such, it has no legal

obligation to pay the proffered wage to the beneficiary.³ Because a corporation is a separate and

³ Nothing shows that [REDACTED] is the successor-in-interest to the original petitioner. *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481, 482 (Comm. 1981), is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

By way of background, *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of Elvira Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).³ This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

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." It will, therefore, be necessary for the petitioner to establish that it can pay the full proffered wage plus applicable overtime in years 2004, 2005 and 2006 and the difference between the wages paid and the full proffered wage in 2001 and 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during all applicable periods, 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 (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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

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).

In *K.C.P. Food*, 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 the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010) (gross profits overstate an employer’s ability to pay because it ignores other necessary expenses).

As of the date the record closed in the present proceeding, the petitioner’s 2006 federal income tax return is the most recent return available. The petitioner’s tax returns [REDACTED] tax identification number [REDACTED] submitted for 2000 through 2006 state its net income as detailed in the table below.

- In 2000, the petitioner’s Form 1065 stated net income of (\$54,254).⁴
- In 2001, the petitioner’s Form 1065 stated net income of (\$26,432).

⁴ For a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner’s Schedules K have relevant entries for additional deductions in each tax year from 2000 through 2006 and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

- In 2002, the petitioner's Form 1065 stated net income of \$37,050.
- In 2003, the petitioner's Form 1065 stated net income of \$40,066.
- In 2004, the petitioner's Form 1065 stated net income of (\$42,339).
- In 2005, the petitioner's Form 1065 stated net income of (\$101,413).
- In 2006, the petitioner's Form 1065 stated net income of (\$81,648).

The petitioner's tax returns show the ability to pay the proffered wage plus applicable overtime in 2002 and 2003 based on the petitioner's net income. As previously stated, however, the petitioner has established the ability to pay the proffered wage plus applicable overtime during those years based upon wages paid to the beneficiary. The petitioner's tax returns do not establish the ability to pay the proffered wage plus applicable overtime or the difference between the wages actually paid to the beneficiary and the proffered wage plus applicable overtime based upon its net income or wages paid to the beneficiary in years 2000, 2001, 2004, 2005 or 2006.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage plus applicable overtime or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2000, the petitioner's Form 1065 stated net current assets of (\$18,510).
- In 2001, the petitioner's Form 1065 stated net current assets of (\$12,574).
- In 2002, the petitioner's Form 1065 stated net current assets of \$8,293.
- In 2003, the petitioner's Form 1065 stated net current assets of (\$42,278).
- In 2004, the petitioner's Form 1065 stated net current assets of (\$29,207).
- In 2005, the petitioner's Form 1065 stated net current assets of (\$125,023).
- In 2006, the petitioner's Form 1065 did not include a copy of its Schedule L.

Therefore, for the years 2000 through 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage plus applicable overtime.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the

⁵ According 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.

priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for years 2002 and 2003.

On appeal, counsel asserts that the ability to pay the proffered wage was established by the payment of wages by the petitioner and the petitioner's parent company, and that the director erred in not considering payments made by the parent company. This issue was addressed above. The petitioner and its parent company have separate tax identification numbers and are separate legal entities.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner had negative net income in all relevant years except 2002 and 2003. The petitioner had negative net current assets in all relevant years except 2002, and that year its net assets were only \$8,923. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that it has maintained the continuing ability to pay the proffered wage plus applicable overtime from the priority date onward. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Beyond the decision of the director, the petitioner has not established that the beneficiary has two years of experience in the proffered position as required by the Form ETA 750.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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 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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). *See Spencer Enterprises, Inc. v. United States*, 229 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). The petitioner submitted an experience letter from [REDACTED] which states that the beneficiary worked at that facility as a fast food cook from May 1993 to May 1996. That experience, however, is not listed on the Form ETA 750 and is, therefore, of little evidentiary value. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. In any future filings, the petitioner should establish by independent objective evidence that the beneficiary meets the experience requirements mandated by the Form ETA 750 by the time of the priority date.

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.