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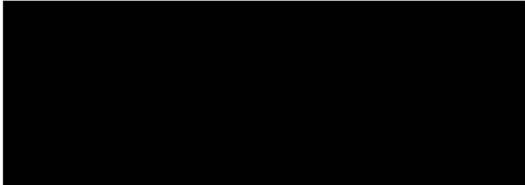
**U.S. Department of Homeland Security**  
U. S. Citizenship and Immigration Services  
*Office of Administrative Appeals MS 2090*  
Washington, DC 20529-2090



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

**PUBLIC COPY**

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FILE:

LIN 07 132 51179

Office: NEBRASKA SERVICE CENTER

Date: **JAN 12 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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1) and 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook.<sup>1</sup> As required by statute, the petition is accompanied by an ETA Form 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 in 2006. The director denied the petition accordingly.

The regulation at 8 C.F.R. § 103.3(a)(2) requires an affected party to file the complete appeal within 30 days after service of the decision, or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. The record indicates that the decision of the director was served on October 19, 2007. An appeal was filed with the Nebraska Service Center on Wednesday, November 28, 2007, 40 days after the decision was served by first class mail.

Thus, the appeal was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

Likewise, the Forms G-28, Entry of Appearance as Attorney or Representative, in the record were signed by the beneficiary, not by an authorized representative of the petitioner and not on behalf of the petitioner. Therefore, the attorney identified in the Form G-28 is counsel to the beneficiary, not counsel to the petitioner. The Form I-290B that was submitted was signed and filed by the attorney identified in the above Form G-28 on behalf of the beneficiary.

U.S. Citizenship and Immigration Services (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a petition; the beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). As the beneficiary and her representative are not recognized parties, counsel is not authorized to file an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B).

As the appeal was not properly filed, it will also be rejected for this reason. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case. However, the instant untimely appeal shall not be treated as a motion by the Nebraska Service Center. As noted above, the instant appeal is being rejected as being both untimely and as being filed by a representative of the beneficiary. As the beneficiary's counsel is not permitted to file an appeal or a motion, the Nebraska Service Center should not consider the untimely

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<sup>1</sup> Specifically, a "cook of Persian food items."

appeal as a motion. 8 C.F.R. § 103.5(a)(1)(iii)(A). However, if the merits of the appeal were to be considered by the AAO, the appeal would be dismissed.

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 ETA Form 750, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 750 was accepted on February 15, 2002. The proffered wage as stated on the ETA Form 750 is \$18.00 per hour (\$37,440.00 per year). The ETA Form 750 states that the position requires two years experience.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1989. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 750B, signed by the beneficiary on February 7, 2003 [sic 2002], the beneficiary did not claim to have worked for the petitioner.

On July 18, 2007, the director issued a Request for Additional Evidence (RFE) asking for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward, specifically the petitioner's tax returns for 2002, 2003, 2004, 2005, and 2006,

or its audited financial statements, as well as the W-2 Wage and Tax Statements for 2002 through 2006 issued by the petitioner to the beneficiary.

Concerning the two years of experience required by the labor certification, the director requested evidence in the form of letters from current or former employers providing the name, address, and title of the employer(s), with a description(s) of the employment experience(s) of the beneficiary including specific dates and duties.

Counsel responded to the RFE on August 21, 2007, and submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2002, 2003, 2004, 2005, and 2006; and, concerning the beneficiary's qualifications, two prior employment reference translations (both without the original foreign language document) from [REDACTED] both businesses located in Tehran, Iran.

On October 19, 2007, the director denied the Form I-140 petition. The petitioner appealed.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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, 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 petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2002 or subsequently. According to the record, the petitioner does not employ the beneficiary.

On appeal, counsel asserts that the petitioner's gross income in 2006, i.e. \$1,576,766.00, is evidence of the petitioner's ability to pay the proffered wage. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent.

*Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on August 21, 2007, with the receipt by the director of the petitioner's submissions in response to the director's 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 was the most recent return available. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2002, the Form 1120S stated net income<sup>2</sup> of \$114,119.00.
- In 2003, the Form 1120S stated net income of \$65,666.00.
- In 2004, the Form 1120S stated net income of \$65,650.00.
- In 2005, the Form 1120S stated net income of \$73,181.00.
- In 2006, the Form 1120S stated net income of \$25,837.00.

Therefore, for year 2006, the petitioner did not have sufficient net income to pay the proffered wage. In years 2002 through 2005, the petitioner more likely than not had sufficient net income to pay the proffered wage.

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>3</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 2006 tax return demonstrates its end-of-year net current assets as negative \$30,000.00.

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2006.

Therefore, from the date the ETA Form 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 priority date through its net income, or net current assets.

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<sup>2</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), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 18, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, other adjustments shown on its Schedule K for the years for which tax returns were submitted, the petitioner's net income is found on Schedule K of its tax returns.

<sup>3</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.

On appeal, counsel asserts the petitioner's "current business assets" "with the ordinary income," would exceed current liabilities and demonstrates the petitioner's ability to pay the proffered wage. Counsel's assertion is misplaced. Net assets for 2006 are \$36,539.00 and current liabilities are \$66,548.00. As stated above, the petitioner's net current assets for 2006 are <\$30,009.00>. Net income for that year is \$25,837.00, if this is what counsel means by ordinary income. The petitioner's total income (Form 1120S, Line 6) must be offset by its deductions on the Form 1120S (i.e. Lines 7 through 21).

Further, counsel's assertion is misplaced if the phrase "current business assets" indicates "total assets." USCIS will review the petitioner's assets. The AAO rejects the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include assets that the petitioner uses in its business. Those assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Further adding net income from the Form 1120S with assets from Form 1120S, Schedule L is duplicative of the petitioner's finances.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in 2006.

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 *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 was established in 1989. There is a paucity of information concerning the petitioner. There is no information in the record concerning the number of petitioner's employees, the number of non-employees working in the business, its business reputation, or its market share in the community.

The petitioner's gross receipts for 2002, 2003, 2004, 2005, and 2006 ranged from a low of \$1,521,752.00 in 2005 to a high of \$1,576,766.00 in 2002. The petitioner's two lowest years were in 2005 and 2006 (i.e. 2005-\$1,521,752.00 and 2006-\$1,524,349.00). Its business prospects appear to be in a downturn.

In 2006, the petitioner had its highest "cost of labor," i.e. Form 1120S, Schedule A, Line 3, expense of \$323,109.00, which is 129% higher than the same cost in 2002. There is no detailed information concerning non-employee compensation paid by the petitioner for services in 2006. Further, the petitioner either fails to state its "salaries and wages" expense in years 2002, 2005, and 2006, or states a nominal expense relative to its gross receipts, e.g. \$36,000.00 in 2003 and 2004.

No unusual and/or unique circumstances have been shown to exist in this case to account for the petitioner's stated net income that is lower than the proffered wage, or the petitioner's negative net current asset figure in 2006. 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.

Further, there is no statement in the record that the sole shareholders and owners of the petitioner would be willing or able to relinquish their officers' compensation to pay the proffered wage.

Beyond the decision of the director, an additional issue in this case would be whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The petitioner must also demonstrate that on the priority date, the beneficiary had the qualifications stated on its ETA Form 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 alien's credentials meet the requirements set forth in the labor certification. 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 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.

USCIS will look to the labor certification to ascertain the job requirements. According to the ETA Form 750, the job requires two years of experience.

The job duties of cook are stated in Item 13 of the ETA Form 750, Part A as follows.

Preparation of lunch and dinner meals of Persian and daily basis. Salads, main course and dessert items. Cut marinate, cook, cook meats, vegetables and rice, Persian stews such as chormeh sabzi according to prescribed method. Develop new menus. Prepare according to menu of special recipes and requests.

The ETA Form 750 indicates that DOL assigned the SOC/O\*Net(OES) code 35-2014 with accompanying job title “cooks, restaurants” to the offered position. DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database at <<http://online.onetcenter.org/link/summary/11-2014.00>> as accessed November 18, 2009, the job title falls within “Job Zone Two: Some Preparation Needed.” DOL assigns a standard vocational preparation (SVP) range of 4.0 to < 6.0 to Job Zone 2 occupations, which means these occupations usually require a high school diploma. Additionally, DOL states the following concerning the education, related experience and job training for this occupation:

Some previous work-related skill, knowledge, or experience is usually needed. For example, a teller would benefit from experience working directly with the public. Employees in these occupations need anywhere from a few months to one year of working with experienced employees. A recognized apprenticeship program may be associated with these occupations. These occupations often involve using your knowledge and skills to help others. Examples include sheet metal workers, forest fire fighters, customer service representatives, physical therapist aides, salespersons (retail), and tellers.

*See id.* Because of the requirements of the offered position and the DOL’s standard occupational requirements, the proffered position is for a skilled worker. The above regulation (i.e. 8 C.F.R. § 204.5(l)(3)) and decisional law requires that USCIS determine if the beneficiary meets the requirements of the labor certification. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). (*See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9<sup>th</sup> Cir.1983).

In this regard, the regulation at 8 C.F.R. § 204.5(l)(3) requires job experience letters on company letterhead to include the former and current employers of the beneficiary, the name, address and title of the writer and a listing of the beneficiary's dates of employment, job title and a specific description of the duties performed by the beneficiary. The beneficiary listed two prior employers on the ETA Form 750.

The beneficiary's stated on the ETA Form 750, Part B, that her most recent work experience was from May 26, 1997, to March 8, 2000 with the [REDACTED] as a Persian food cook.

The beneficiary described the job duties of this position as "Executive chef I [sic in] charge of creating weekly menus and running the kitchen on [a] daily basis."

In substantiation of [REDACTED] work experience, the petitioner has submitted a prior employment reference made March 14, 2000, from [REDACTED] stating that the beneficiary "has worked in this restaurant as the Chef Cook for Iranian Foods & Foreign Cousin [sic cuisine] from May 26, 1997 to March 8, 2000, and she is one of the experts and the best Cooks who worked at this restaurant."

The letter does not conform to the regulation at 8 C.F.R. § 204.5(l)(3) and is insufficient evidence of the beneficiary's qualification as a cook of Persian food items as there is no specific description of the duties performed by the beneficiary at [REDACTED]

Additionally, the beneficiary's stated on the ETA Form 750, Part B, that prior to her employment at the [REDACTED] she was employed by the [REDACTED] a restaurant business, located at [REDACTED] from October 23, 1995 to April 16, 1997, as a Persian food cook.

The beneficiary described the job duties of this position as "Cooked basic Persian meals for dinner period. I had 3 people working under myself, helped in making and creating daily specials."

In substantiation of the [REDACTED] work experience, the petitioner has submitted a prior employment reference made April 22, 2000, from [REDACTED] that the beneficiary "has worked in this restaurant as the Chef Cook for Iranian Foods & Foreign Cousin [sic cuisine] from Oct. 23, 1995 to April 16, 1997,<sup>4</sup> and she is one of the experts and the best Cooks who worked at this restaurant."

The letter does not conform to the regulation at 8 C.F.R. § 204.5(l)(3) and is insufficient evidence of the beneficiary's qualification as a cook of Persian food items as there is no specific description of the duties performed by the beneficiary at [REDACTED]

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<sup>4</sup> According to the ETA Form 750, Part B, the beneficiary was unemployed from March 2000 to present, i.e. February 7, 2002.

Since the prior employment references are almost identical in format as well as content, they appear to be pre-prepared by a third party, and presumably, they are not the statements of either manager. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Further, there is no correlative evidence to support the beneficiary's employment history such as cancelled pay checks, pay stubs, a history of bank deposits of the beneficiary's pay checks, or the beneficiary's personal tax returns.

Therefore, the preponderance of the evidence does not demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

The petition would have been dismissed for the above stated reasons, if the appeal were not being rejected, with each considered as an independent and alternative basis for dismissal.<sup>5</sup> 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 rejected.

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<sup>5</sup> 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 Dor v. INS*, 891 F.2d at 1002 n. 9.