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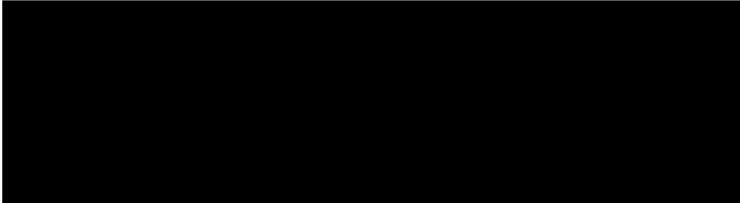
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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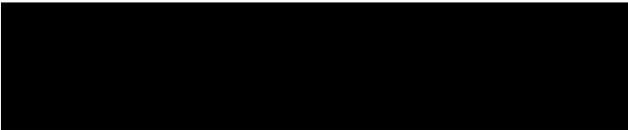
Office: NEBRASKA SERVICE CENTER

Date: **MAR 02 2010**

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

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 documents have been returned to the office that originally decided your case. Any further inquiry concerning your case must be made to that office.

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

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition filed by the petitioner in this case was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be upheld and the appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a garde manger. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage, and denied the petition accordingly.

The record shows that the appeal is properly and timely filed, 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 September 30, 2008 denial, the single 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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the 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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 was accepted on April 30, 2001 and certified on May 11, 2007 initially on behalf of the original beneficiary.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$13.42 per hour (\$27,913.60 per year based on working 40 hours per week). The Form ETA 750 states that the position requires one year of experience in the job offered. The I-140 petition on behalf of the instant beneficiary was submitted on June 25, 2007. The instant petition is for a substituted beneficiary.<sup>2</sup> On the petition the petitioner claimed to have been established in 1992,<sup>3</sup> to have a gross annual income of \$2,290,001, and to currently employ 20 workers. With the petition the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on June 20, 2007, the beneficiary stated that he has been working for the petitioner since January 2006.

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

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<sup>1</sup> The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. U.S. Citizenship and Immigration Services (USCIS) records do not contain any I-140 immigrant petition filed and approved on behalf of the original beneficiary based on the instant labor certification.

<sup>2</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>3</sup> The petitioner's Form 1120 U.S. Corporation Income Tax Return indicates that it was incorporated on February 3, 1993 which is supported by the corporation data in the NYS Department of State Division of Corporations official website at [http://appsext8.dos.state.ny.us/corp\\_public/CORPSEARCH.ENTITY\\_INFORMATION?](http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?) (accessed on February 22, 2010).

has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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, 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 submitted the beneficiary's W-2 forms issued by the petitioner for 2006 through 2008, and paystubs for the period from May 4, 2009 to August 9, 2009. The W-2 forms show that the petitioner paid the beneficiary \$28,525.000 in 2006, \$39,606.85 in 2007 and \$43,524.85 in 2008. The paystubs show that the petitioner paid the beneficiary at the level of \$1,600 bi-weekly in 2009. Therefore, the petitioner employed and paid the beneficiary at a salary greater than the proffered wage of \$27,913.60 per year in 2006 through 2009, and thus, has established that it employed and paid the beneficiary the full proffered wage for these years. However, it is still obligated to demonstrate that it had the sufficient net income or net current assets in the years 2001 through 2005.

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.

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<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is from February 1 to January 31. The record contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2007. As discussed above, the petitioner has established its ability to pay the instant beneficiary the full proffered wage from 2006 through the examination of wages already paid to the beneficiary, and therefore, the petitioner's federal income tax returns for 2006 and 2007 are not necessarily dispositive. The petitioner's income tax returns demonstrate its net income for 2001 through 2005, as shown in the table below.

- In the fiscal year 2001, the Form 1120 stated net income<sup>5</sup> of (\$12,143).
- In the fiscal year 2002, the Form 1120 stated net income of (\$9,002).
- In the fiscal year 2003, the Form 1120 stated net income of (\$4,351).
- In the fiscal year 2004, the Form 1120 stated net income of \$5,342.
- In the fiscal year 2005, the Form 1120 stated net income of (\$4,191).

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the instant beneficiary 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>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return demonstrates its end-of-year net current assets for 2005 as shown below.

- In the fiscal year 2001, the Form 1120 stated net current assets of (\$94,891).
- In the fiscal year 2002, the Form 1120 stated net current assets of (\$110,398).
- In the fiscal year 2003, the Form 1120 stated net current assets of (\$112,563).
- In the fiscal year 2004, the Form 1120 stated net current assets of (\$43,445).
- In the fiscal year 2005, the Form 1120 stated net current assets of (\$71,296).

For the years 2001 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the instant beneficiary the proffered wage as of the priority date in 2001 to 2005 through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel submitted the petitioner's monthly bank statements covering the period from April 2001 to July 2009 and claimed that each month's balance of more than enough to establish the

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<sup>5</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

<sup>6</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.

petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 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 material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable 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 reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also submitted the petitioner's Schedule of Net Current Assets on the Accrual Basis for 2001 through 2008 prepared by an independent accountant. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are engaged to apply agreed-upon procedures, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. As the accountant's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel also submitted a letter from the certified public accountant to convert the petitioner's accounting method from cash basis to accrual basis to show more net current assets for the petitioner. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Services (IRS).

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage

beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

Counsel advised that the beneficiary has replaced former workers. The record contains W-2 forms for those replaced employees for the relevant years. These W-2 forms show that the petitioner paid [REDACTED] \$47,055.39 in 2001, \$49,723.74 in 2002, and \$50,278.34 in 2003; paid [REDACTED] \$18,734.75 in 2004 and \$23,430.51 in 2005; and paid [REDACTED] \$39,000 in 2004 and \$40,5000 in 2005. The record also contains three affidavits from [REDACTED] of the petitioner, [REDACTED] of the petitioner, and [REDACTED] of the restaurant, dated August 16, 2009 (the revised affidavits). All of them state that [REDACTED] was employed by the petitioner as a [REDACTED] from January 1998 to December 2003; [REDACTED] and [REDACTED] worked as garde mangers in [REDACTED] place in 2004 and 2005; and the beneficiary replaced both of [REDACTED] and [REDACTED] from 2006.

Although affidavits name those replaced workers, state that these workers worked in the same position as the proffered position, and verify that the beneficiary replaced these workers, all of the three are from the same management of the petitioner, in the same format and language, and dated on the same day. Counsel in this case is the notary public for all these three affidavits. The notary statement "SUBSCRIBED AND sworn to before me this 16<sup>th</sup> of August, 2009, in New York, New York", does not make clear whether an oath has been properly administered for the clarification and authenticity of the statements in affidavits. The declarations are not affidavits as they were not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. See *Black's Law Dictionary* 58 (West 1999). Statements made in support of a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

It is also noted that the record contains another set of three affidavits dated April 28, 2009 which were submitted with counsel's third motion to reopen/reconsider (the affidavits). In the affidavits, the three declarants stated that [REDACTED] replaced [REDACTED] in 2004 and the beneficiary replaced [REDACTED] in 2006; however, the same three state in the revised affidavits that [REDACTED] and [REDACTED] both replaced [REDACTED] and the beneficiary replaced both [REDACTED] and Yeung [REDACTED]. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The record does not contain any independent objective evidence to resolve the inconsistency between the two sets of affidavits. Counsel did not submit independent objective evidence such as the petitioner's personnel records, employment (hiring and terminating) documents, and quarterly reports for these workers, to verify their employment and termination, positions and duties. Neither counsel nor the petitioner provided an explanation why the petitioner needed two new garde mangers to replace [REDACTED] and how the beneficiary could replace both [REDACTED] and [REDACTED]. In addition, the record does not contain any documentary evidence

showing whether these replaced workers are U.S. workers and whether they were fired or laid off.<sup>7</sup> Because of these defects, the affidavits submitted by the three managers of the petitioner cannot be given full evidentiary weight. Therefore, counsel's assertion on replacement cannot overcome the ground of the director's denial.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously or approved, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending and approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has filed additional Immigrant Petitions for Alien Worker (Form I-140) for four more workers and two nonimmigrant petitions (Form I-129), and all of the six petitions were approved.<sup>8</sup> Since all of the four approved immigrant petitions were filed with the same priority date as the instant petition, the petitioner must demonstrate its ability to pay total five proffered wages in each of years 2001 through 2008. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the

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<sup>7</sup> The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification.

<sup>8</sup> USCIS records show that the petitioner filed five Form I-140 immigrant petitions including the instant petition and two Form I-129 nonimmigrant petitions. The detailed information about those four approved immigrant petitions is as follows:

- LIN-07-209-52598 filed on June 25, 2007 with the priority date of April 30, 2001, and approved on August 26, 2009.
- SRC-08-020-52279 filed on October 18, 2008 with the priority date of April 30, 2001, and approved on March 25, 2009.
- SRC-08-032-52602 filed on October 24, 2008 with the priority date of April 30, 2001, and approved on July 21, 2009.
- SRC-08-095-53497 filed on January 29, 2008 with the priority date of April 30, 2001, and approved on June 17, 2008.

The detailed information about the two approved nonimmigrant petitions is as follows:

- EAC-03-134-52035 filed on March 26, 2003 and approved on October 8, 2003 for a period from 10/08/2003 to 03/17/2005.
- EAC-05-158-50261 filed on May 12, 2005 and approved on May 20, 2005 for a period from 06/01/2005 to 05/31/2008.

petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the five I-140 petitions, the petitioner would have to establish that it has the ability to pay combined salaries of \$139,568<sup>9</sup> for each of the years from 2001 through 2008. In addition, the petitioner must pay the \$35,000 in each of the years from 2003 to 2005 and \$24,557 per year in each of the years from 2005 to 2008.

As previously discussed, the petitioner did not have sufficient net income or net current assets to pay a single proffered wage in years 2001 through 2005. The record does not contain any documentary evidence showing that the petitioner paid the four beneficiaries of the approved immigrant petitions in 2001 through 2008. The petitioner failed to establish its ability to pay all five proffered wages in 2001 through 2005 through an examination of wages paid to the beneficiaries, or its net income or net current assets. The petitioner also failed to establish its ability to pay the additional four proffered wages in 2006 through 2008 through an examination of wages paid to the beneficiaries, or its net income or net current assets.

Therefore, 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 beneficiaries the proffered wages as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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.

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<sup>9</sup> The AAO assumes that proffered wages in those approved petitions are identical to the one in the instant case.

In the instant case, given the record as a whole, the petitioner's history of filing petitions and the fact that the number of immigrant and nonimmigrant petitions reflects an increase of thirty-five percent (35%) of the petitioner's workforce, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 wages.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether the petitioner has demonstrated that the beneficiary possessed the required experience for the proffered position prior to 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, 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).

In the instant case, the Form ETA 750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of garde manger. The applicant must have one year of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A does not reflect any special requirements.

The regulation at 8 C.F.R. § 204.5(1)(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 regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

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

As noted above, on the Form ETA 750B signed by the beneficiary on June 20, 2007, the beneficiary represented that his qualifying employment experience was at a restaurant called [REDACTED] at [REDACTED] as a garde manger from May 1998 to March 2001.

The record contains an experience letter from [REDACTED] of [REDACTED] certifying the beneficiary's experience as a garde manger at [REDACTED] from May 1998 to March 2001. This letter verifies the beneficiary's more than one year experience in the proffered position and includes a specific description of the duties performed by the beneficiary while he worked for [REDACTED] as required by the regulation at 8 C.F.R. § 204.5(g)(1). However, the letter does not include the title of the writer. Without such a title or position, the AAO cannot determine whether this experience letter is from the beneficiary's former employer or colleague, and thus, cannot consider this letter as primary evidence to demonstrate the beneficiary's qualifying experience for the proffered position. The record does not contain any documentary evidence, such as personnel records, payment records or income statements from [REDACTED] for the beneficiary, to support the contents of the letter. The petitioner failed to establish the beneficiary's qualifications for the proffered position with regulatory-prescribe evidence.

In addition, as previously mentioned, USCIS records show that the petitioner filed five immigrant petitions and all of the five are with the priority date of April 30, 2001. The petitioner offered five jobs to the five beneficiaries on the same day when it filed the five labor certification applications on April 30, 2001. The petitioner must establish that each of its job offers to the beneficiaries was realistic as of the priority date and that each of the offers remained realistic for each year thereafter, until each of the beneficiaries obtains lawful permanent residence. The petitioner claimed on the instant petition which was filed in 2007 that it employed 20 workers at that time. The record does not contain any documents showing how many employees the petitioner was hiring in 2001. The petitioner's 2001 tax return shows that the petitioner paid salaries and wages of \$113,015 that year. Assuming that the petitioner paid its employees at the same level of the proffered wage in the instant case, the number of its employees could not be more than four. The fact that a business entity with four employees offers five jobs at a time causes doubt whether each and every job offer is realistic and *bona fide*. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the

reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 582. Therefore, the petitioner failed to demonstrate that each of its job offers was as of the priority date and remained realistic and bona fide until the beneficiary obtains lawful permanent residence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.