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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: **MAR 15 2010**  
SRC 06 528 51974

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

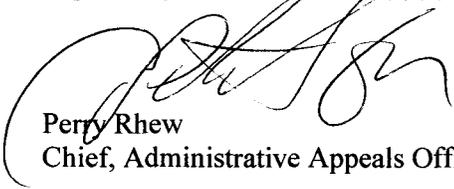
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to  
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  
[Redacted]

INSTRUCTIONS:

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 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 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the 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 of \$10.45 per hour, annualized to \$21,736 per annum, beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence contends that the petitioner has demonstrated its ability to pay the proffered wage.

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)(noting that the AAO reviews appeals on a *de novo* basis). 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);

The procedural history of this case is herein incorporated as set forth in the record and will not be repeated. It is noted that the AAO issued a request for evidence on November 6, 2009, soliciting specific evidence related to; 1) the *bona fides* of the petitioner as an employer qualified to file an ETA 9089; 2) the beneficiary's requisite two years of experience in the job offered as a cook as set forth on the ETA Form 9089 relevant to claims made on records of compensation and employer verification and, 3) the petitioner's continuing ability to pay the proffered wage. The petitioner submitted a response to the request for evidence but the response was not sufficient to establish that it could be regarded as a *bona fide* employer qualified to file an ETA 9089 based on a conversion of an ETA 750 labor certification previously filed. Even if the petitioner could be considered eligible to file the ETA 9089 as a conversion from an ETA 750 with a priority date of April 6, 2004, the petitioner failed to establish that it has had the continuing ability to pay the proffered wage as of the priority date or that the beneficiary possessed the requisite two years of work experience as a cook.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). *See* 8 C.F.R. § 204.5(d). As stated on the ETA 9089, the proffered wage is \$10.45 per hour or \$21,736 per year.

As indicated in the record, the director denied the petition on February 21, 2007. The director observed that the petitioner, [REDACTED], also filed the ETA Form 9089. As indicated on Item 1 of Part A, the petitioner claimed that a priority date of April 6, 2004<sup>1</sup> had been established based

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<sup>1</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the PERM regulations apply because the petitioner filed a

on the filing of a previously submitted Application for Alien Employment Certification (ETA 750). The director ultimately concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage.

It is noted that only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). *See* 8 C.F.R. § 204.5(c).

The regulation at 20 C.F.R. § 656.3 provides in pertinent part:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification (FEIN). For purposes of this definition, an 'authorized representative' means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

*Employment* means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

The regulation at 20 C.F.R. § 656.17(d) provides in pertinent part:

- (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:
  - (i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

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labor certification application on ETA Form 9089 seeking to convert the previously submitted ETA Form 750 to an ETA 9089 under the special conversion guidelines set forth in PERM. 20 C.F.R. § 656.17(d) sets forth the requirements necessary for the converted labor certification application to retain the priority date set forth on the former ETA 750. The petitioner originally submitted Form ETA 750 on April 6, 2004.

- (ii) Withdrawing the original application in accordance with ETA procedures. Filing an application under this part stating the employer's desire to use the original filing date will be deemed to be a withdrawal of the original application. The original application will be deemed withdrawn regardless of whether the employer's request to use the original filing date is approved.
- (2) Refilings under this paragraph must be made within 210 days of the withdrawal of the prior application.
- (3) A copy of the original application, including amendments, must be sent to the appropriate ETA application processing center when requested by the CO under Sec. 656.20.
- (4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the *employer*, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. . . .
- (5) For purposes of this paragraph (i):  
The term "employer" means an entity with the same Federal Employment Identification Number (FEIN), provided it meets the definition of an employer at Sec. 656.3

As indicated in the record of proceedings, the petitioner, [REDACTED], FEIN [REDACTED], was not incorporated and did not exist until September 20, 2004,<sup>2</sup> more than five months after the filing date of April 6, 2004, as indicated on page 9 of the ETA Form 9089. Moreover, the regulations pertinent to the conversion of an ETA 750 labor certification to the ETA Form 9089 do not permit the employer designated on the ETA Form 9089 to be a successor-in-interest. The petitioner in this matter alleges that it is the successor to [REDACTED], FEIN [REDACTED].

Therefore, the petitioner could not be considered as a *bona fide* U.S. employer pursuant to Section 203(b)(3)(A)(i) of the Act as of the priority date set forth on the ETA Form 9089 if a different employer with a different FEIN filed the ETA 750.

Comments and DOL responses to the proposed final rule as adopted in 20 C.F.R. Part 656 explain that if the refiled application is determined not to be identical to the original application in accordance with § 656.17(d), the refiled application will be processed using the new filing date, and the original application will be treated as withdrawn. If the refiled application filed under this

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<sup>2</sup> This date is the endorsement date by the California Secretary of State as shown on the petitioner's stamped Articles of Incorporation contained in the record.

final rule is denied, the filing date on the withdrawn application cannot be used on another application for permanent employment certification. 69 Fed. Reg. 77326, 77342 (Dec. 27, 2004). DOL also states that initially, the proposed rule regarding the definition of an “employer” would adopt the position taken by the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Hayden, Inc.*, 88 I&N 245 (Aug. 30, 1998) whereby the definition of an employer would include predecessor organizations, successors-in-interest, a parent, branch, subsidiary, or affiliate, whether located in the U.S. or another country. After a review of the comments, however, DOL stated that this definition was too broad, stating that the final rule in 20 C.F.R. § 656.17(i)(5)(i) “has been simplified to provide an employer is an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.” 69 Fed. Reg. 77326, 77354 (Dec. 27, 2004).

As observed in the AAO’s request for evidence:

The current record indicates that the petitioner was not incorporated until September 20, 2004. It appears unlikely that the petitioner possessed a FEIN prior to this date enabling it to sponsor the beneficiary on an ETA 750. We request that the petitioner provide a copy of the ETA 750 referred to in Part A of the Form ETA 9089, as well as copies of all correspondence with DOL relating to the conversion of the ETA 750 labor certification to the Form 9089 contained in the record. We further request that the petitioner provide a copy of its application for a FEIN from the Internal Revenue Service (IRS) and the receipt of a FEIN documenting the date of receipt.

The petitioner’s response to the AAO’s request for evidence contained only the following documents:

- 1) copies of W-2s issued to the beneficiary for 2006, 2007, and 2008
- 2) copies of the petitioner’s state and federal income tax returns for 2004, 2005, 2007 and 2008

The petitioner did not provide a copy of the ETA 750 referred to in Part A of the Form ETA 9089 and did not provide copies of correspondence with DOL relating to the conversion of the ETA 750 to the ETA Form 9089 or any documents relevant to who the application for and receipt of a FEIN from the IRS. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Therefore based on the record of proceedings, the petitioner may not be concluded to be a *bona fide* U.S. employer pursuant to Section 203(b)(3)(A)(i) of the Act as of the priority date set forth on the ETA Form 9089 because a different employer with a different FEIN filed the ETA 750 and the regulations pertinent to the conversion of ETA 750 labor certifications to the ETA Form 9089 certifications do not permit the employer to designate itself as a successor-in-interest.<sup>3</sup> An

<sup>3</sup> Further, [REDACTED] two letters of November 1, 2006, contained in the record, each state that the restaurant had been operating since June 1, 2001 under different ownership as [REDACTED]. The letters also state that the restaurant was “bought and incorporated on September 24,

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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

Even if the petitioner was considered qualified to be an employer under the conversion rules, the petitioner has not established a continuing ability to pay the proffered wage of \$21,736. Copies of its 2004, 2005, 2007 and 2008 U.S. Income Tax Return for an S Corporation have been submitted to the record. The 2006 tax return was omitted without explanation. The returns for FEIN # indicate the following:

	2004	2005	2007	2008
Net Income <sup>5</sup>	-\$7,331	\$20,500	\$31,895	\$15,828

2004 under . It is additionally noted that the petitioner's 2004 corporate tax return lists the "date of sale" as October 1, 2004 on Form 8594, Asset Acquisition Statement, not September 24, 2004. However, 's letter of January 3, 2007, which is contained in the record states that there "was no sales transaction" and that the business was "taken over from the previous owners based on a mutual agreement, since they were no longer able to operate this business." This contradiction as well as the discrepancies noted above, also raises a question about the petition's *bona fides*, because the evidence is inconsistent. It is noted that 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. 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. 582, 591-592 (BIA 1988).

<sup>4</sup> It is noted that has used two FEIN numbers. For the 2004, 2005 and 2007 tax returns, the FEIN is listed as . For the 2008 tax return as well as for beneficiary's 2006, 2007, and 2008 W-2s, the FEIN used is . No explanation is offered.

<sup>5</sup> Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 17e (2004, 2005) and line 18 (2007 2008) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 21 of page 1 of the return in 2004, 2005 and 2008 because no additional deductions, credits or adjustments are shown on Schedule K. The petitioner's net income is shown on line 18

Current Assets	\$7,372 <sup>6</sup>	\$6,695	\$12,160	\$ 8,503
Current Liabilities	\$ n/a	\$2,780	-0-	-0-
Net Current Assets	\$7,372	\$3,915	\$12,160	\$ 8,503

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>8</sup>

The AAO noted in its request for evidence that relevant to the payment of wages to the beneficiary and his employment history, the petitioner's sole shareholder, [REDACTED] provided four letters to the record. In a letter dated November 1, 2006, [REDACTED] states that the beneficiary "had been employed since June 01, 2001 as a part time employee, and his employment has been changed to full time status since Aug 01, 2006 and his salary has been increased to \$20,060/annual." In another letter, also dated November 1, 2006, [REDACTED] states that the beneficiary has been "employed since February, 2002, as a cook." In a letter dated August 9, 2006, [REDACTED] states that the beneficiary is currently employed by the petitioner as a cook, starting "February 2, 2002 to the present, 40 hours per week." It is not clear from these letters whether the beneficiary worked for the petitioner since June 1, 2001, February 2, 2002, or August 1, 2006.

Copies of Wage and Tax Statements (W-2) contained in the record indicate the following amounts paid to the beneficiary:

Year	Amount	Payer
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of Schedule K in 2007.

<sup>6</sup>The 2004 figures for Schedule L are taken from the beginning of the year numbers listed on Schedule L for 2005.

<sup>7</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.

<sup>8</sup> A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

2002	\$12,960
2003	\$13,500
2004	\$12,000
2005	\$12,000
2006	\$22,676
2007	\$25,715.79
2008	\$32,400.00



Copies of the W-2s for 2006, 2007, and 2008 were submitted in response to the AAO's request for evidence.

As noted above, [REDACTED] letters contain conflicting representations as to when or if the beneficiary began his employment at the restaurant and whether or when his employment has been full-time or part-time. Additionally, as noted above, if his work is claimed to be full-time for the entire period between 2002 through 2005, it raises a question how the petitioning corporation, which did not exist until September 20, 2004, reflects that it paid \$12,000 in wages for the entire year of 2004.

In view of these discrepancies, the AAO requested the petitioner to provide an explanation of the beneficiary's employment history and a record of payment of wages to the beneficiary during all periods of employment for the petitioner, particularly in 2004 when a similar amount of compensation is shown to be paid for, at maximum, slightly more than three months of employment. The AAO requested that the petitioner explain the circumstances that prompted the EDD of California to issue a reconciliation statement to the petitioner in 2004, which reflected \$20,000 in wages paid by the petitioner. The petitioner, [REDACTED], was additionally requested to provide copies of all California Quarterly Wage and Withholding Reports beginning with 2004 to the present, which reflected wages paid to the beneficiary by the petitioner and by [REDACTED]. The request stated that the reports should identify all employees working for these entities during all of the quarters requested. The documentation should be submitted directly from the EDD of California to the AAO to the address given on page 1 of the request, in a sealed (unbroken) envelope.

As set forth above, the petitioner failed to provide an explanation as requested above and failed to provide copies of all state quarterly wage and withholding reports as requested above. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

It is noted that the copy of the petitioner's 2004 corporate tax return, signed on August 12, 2006, by the petitioner's president, which was submitted to the record, shows no salaries or wages paid on line 8 of page 1 of the return and reflects only \$3,681 in salaries and wages paid on Form 100S, Page 2, Schedule F.

The AAO also requested that the petitioner provide: 1) verification from the Social Security Administration that confirms the date and information contained in the W-2s for 2004 and 2005 issued to the beneficiary that are contained in the record; 2) a copy of its 2004 corporate tax return with a verification from the IRS that the return was actually filed; 3) copies of negotiated payroll checks, to exhibit payment and check cashing, of wages paid to the beneficiary by the petitioner [REDACTED], in 2004 and 2005, as well as copies of payroll records showing hours worked, wages paid, deductions, and year-to-date wages paid during the same period; 4) the petitioner was also requested to provide such information for 2004 from the previous owner, [REDACTED] and 5) the petitioner was requested to provide payroll records showing the beneficiary's wages and hours worked (including year-to-date wages) for 2006, 2007, 2008 and 2009, as well as copies of the relevant W-2s. The petitioner's response to these requests failed to include any of the documents requested except copies of the beneficiary's W-2s for 2006, 2007, and 2008.

In view of the fact that the discrepancies of wages paid to the beneficiary have not been resolved by the petitioner in response to the AAO's request for evidence or supported by the submission of the corroborating documentation requested above except for copies of three years of W-2s, any record of wages paid to the beneficiary will not be considered in determining the petitioner's ability to pay the proffered wage in any of the relevant years.

As set forth above, even if the petitioner were considered a qualified employer eligible to file a Form ETA 9089, its 2004 tax return reflects that neither its net income of -\$7,331 nor its net current assets of \$7,372 was sufficient to cover the proffered wage of \$21,736 per year. The petitioner also failed to demonstrate its ability to pay the proffered wage in 2005 because neither its net income of \$20,500 nor its net current assets of \$3,915 failed to equal or exceed the proffered wage.<sup>9</sup> As the petitioner failed to submit a copy of its federal tax return, audited

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<sup>9</sup> Unless the petitioner credibly establishes 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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736

financial statement or annual report for 2006, the ability to pay has not been demonstrated for this year. In 2007, the petitioner's net income of \$31,895 was sufficient to cover the proffered wage and establish the petitioner's ability to pay in this year. In 2008, neither the petitioner's net income of \$15,828 nor its net current assets of \$8,503 was sufficient to cover the proffered wage of \$21,736 or demonstrate its ability to pay in this year. Therefore, as set forth above, the petitioner has failed to demonstrate its continued ability to pay the proffered wage.

As noted above, the labor certification required that the candidate have two years of prior experience as a cook. With respect to the beneficiary's employment history, in order to determine whether the beneficiary met the requirements of two full-time years of experience in the job offered, as noted in the AAO's request for evidence, a letter in the form of an affidavit was submitted by [REDACTED]. He attests to the beneficiary's full-time work (40 hours per week) as a cook from June 1997 to October 2000. Copies of compensation paid to the beneficiary by this entity were submitted in the form of a W-2

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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);

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.

In some cases, a petitioner's overall circumstances may outweigh evidence of small profits. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this case, the petitioner's tax returns do not represent the kind of framework of profitability such as that discussed in *Sonogawa*. Further, the petitioner has failed to demonstrate that such unusual and unique business circumstances exist in this case, which is analogous to the facts set forth in that case. The petitioner also did not submit any evidence of reputation similar to *Sonogawa*.

for 2000 showing \$14,575.53 paid and a W-2 for 1999 reflecting \$2,175 paid to the beneficiary. Copies of 1999 payroll records show year-to-date wages of \$2,145 as of December 20, 1999. Payment of salary of \$2,175 in 1999 does not corroborate [REDACTED] claim that the beneficiary was employed full-time at this business in 1999. It raises doubts as to the beneficiary's claim of this employment as full-time as stated on the ETA Form 9089 and fails to establish that the beneficiary acquired the requisite experience as stated on the ETA Form 9089. The AAO requested the petitioner to provide credible evidence that the beneficiary had twenty-four months (two years) of employment experience as a cook as of the priority date as claimed on the ETA 9089. The petitioner was advised that such evidence should include proof of compensation paid such as payroll records accompanied by copies of negotiated checks that reflect full-time employment during the period claimed. As noted above, the petitioner failed to respond to this issue in its response to the AAO's request for evidence. Therefore it may not be concluded that the petitioner established that the beneficiary possessed two full-time years of work experience as a cook as set forth in the ETA 9089.

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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner was requested to resolve the questions raised in the record and to submit supporting documentation as set forth in the AAO's request for evidence. Its response failed to resolve these inconsistencies and failed to establish that the petition was eligible for approval. Upon review of the evidence contained in the record, the AAO concludes that the evidence failed to demonstrate that the petitioner was eligible to file a Form ETA 9089 based on the regulations governing the conversion of a previously filed ETA 750. Additionally, even if considered a qualified employer, the petitioner failed to establish its *continuing* ability to pay the proffered wage as of the priority date as required by 8 C.F.R. § 204.5(g)(2) and failed to establish that the beneficiary possessed the requisite work experience as required by the terms of the labor certification.

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.

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.