

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**

B6

FILE:

SRC 08 129 52923

Office: TEXAS SERVICE CENTER

Date: **MAR 17 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further consideration and entry of a new decision.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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

As set forth in the director's June 19, 2009 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)(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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment

Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on April 27, 2001.<sup>1</sup> The proffered wage as stated on the Form ETA 9089 is \$24.65 per hour (\$51,272 per year). The Form ETA 9089 states that the position requires a bachelor's degree in International Economics/Management and two years of experience in the job offered of assistant manager.

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.<sup>2</sup>

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.<sup>3</sup> On the petition, the petitioner claimed to have been established on January 1,

---

<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 labor certification (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.

<sup>2</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).

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

1989 and to currently employ 40 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, the beneficiary did not claim to have worked for the petitioner.<sup>4</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

---

<sup>4</sup> The AAO notes that the Form ETA 9089 is not signed by either the petitioner, counsel, or the beneficiary. Therefore, this petition was not eligible for approval at filing because it was not accompanied by a valid labor certification. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

(a) Filing applications.

- (1) . . . Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

Although a Form ETA 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition, it was not signed by the alien, counsel, or the petitioner. As such, the preference petition could not be approved until the Form ETA 9089 is appropriately signed.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash 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 petitioner's tax returns stated its net income for 2001 through 2007 as detailed in the table below.

---

<sup>6</sup> For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant

- In 2001, the petitioner's Form 1065 stated net income of \$4,788.<sup>6</sup>
- In 2002, the petitioner's Form 1065 stated net income of -\$976,483.
- In 2003, the petitioner's Form 1065 stated net income of -\$292,441.
- In 2004, the petitioner's Form 1065 stated net income of -\$136,360.
- In 2005, the petitioner's Form 1065 stated net income of \$278,693.
- In 2006, the petitioner's Form 1065 stated net income of \$83,957.
- In 2007, the petitioner's Form 1065 stated net income of -\$653,662.

Therefore, for the years 2001 through 2004 and 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage. Furthermore, the AAO notes that the petitioner has filed additional nonimmigrant petitions subsequent to the priority date of the instant petition. The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Thus, while it appears that the petitioner had sufficient funds to pay the proffered wage to the beneficiary in 2005 and 2006, the record does not show that the petitioner could have paid the beneficiary and the additional sponsored beneficiaries in those years from its net income.<sup>7</sup>

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and

---

entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedules K have relevant entries for additional income, credits, deductions or other adjustments in 2001 through 2007 and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

<sup>7</sup> The AAO notes that the petitioner sponsored at least two nonimmigrant beneficiaries in 2005 and 2006.

<sup>8</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.

the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net current assets of -\$145,257.
- In 2002, the petitioner's Form 1065 stated net current assets of -\$1,731,287.
- In 2003, the petitioner's Form 1065 stated net current assets of -\$1,414,110.
- In 2004, the petitioner's Form 1065 stated net current assets of \$1,198,773.
- In 2005, the petitioner's Form 1065 stated net current assets of \$1,467,425.
- In 2006, the petitioner's Form 1065 stated net current assets of \$1,310,986.
- In 2007, the petitioner's Form 1065 stated net current assets of -\$507,480.

Therefore, for the years 2001 through 2003 and 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage of \$51,272 and the proffered wages to the additional sponsored beneficiaries. In 2004 through 2006, the petitioner has shown that it had sufficient funds to pay the proffered wage of \$51,272 to the beneficiary and the wages for additional petitions filed.

Thus, from the date the Form ETA 9089 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 an examination of wages paid to the beneficiary, or its net income or net current assets, except for the years 2004 through 2006.

On appeal, counsel submits a letter, dated August 19, 2009, from [REDACTED], who states that the petitioner "employs approximately 120 at our lowest point of the season to roughly 300 individuals during peak season, and had gross assets of approximately \$25 million in 2008." Counsel claims that this evidence meets the standard required to demonstrate a petitioner's ability to pay the proffered wage. However, the AAO notes that the Form I-140, filed with USCIS on March 13, 2008, states that the petitioner employs 40 employees. Neither counsel nor the petitioner provides any explanation for this discrepancy. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

\* \* \*

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.

Should the petitioner wish to pursue this petition further, it would need to provide evidence of the actual number of workers it is employing.

On appeal, counsel submits an audited financial statement for 2003 for the petitioner showing (restated) net income in excess of \$300,000. The petitioner's 2003 income tax return reflects a net income of -\$292,441 from Schedule K. The accountant's letter accompanying the 2003 audited financial statement, however, fails to address why the petitioner's restated income differs from its 2003 tax return.<sup>9</sup> See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, counsel claims that non-current assets, including "other investments" (Schedule L, Line 8), "other assets" (Schedule L, Line 13), and "partners' capital accounts" (Schedule L, Line 21) of the petitioner's tax returns should be considered when evaluating the petitioner's ability to pay the proffered wage of \$51,272.

The AAO does not agree. The "other" investments" and "other assets" referred to on the petitioner's tax returns are a loan to [REDACTED] and a note receivable to [REDACTED]. According to the accountant's report, [REDACTED] constructed and owns the property, and leases it to the petitioner. The record does not contain a copy of the loan agreement or lease agreement between the petitioner and [REDACTED], or any other documents setting forth any restrictions that might have been placed on the use of the petitioner's investment capital. Loan agreements/operating agreements/notes generally restrict how those funds are used, and without evidence that the funds were not restricted in any way, we cannot accept the accountant's assertion that the petitioner had the freedom to determine how much money was loaned to [REDACTED] at any given time. Further, even if the petitioner had provided such documents, "other investments" (Schedule L, Line 8) and "other assets" (Schedule L, Line 13) are not current assets that would be available to pay the proffered wage. 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.

"Partners' capital accounts" (Schedule L, Line 21) represent the partners' investment in the partnership. Generally, if a partner invested cash in a partnership, the cash account is debited and the partner's capital account is credited for the invested amount. If a partner invested an amount other than cash, an asset account is debited, and the partner's capital account is credited for the market value of the asset. Thus, the "partners' capital accounts" entry is a counterbalancing entry on the balance sheet that indicates the source of a given asset, cash or otherwise. So, for instance, if the partner invested cash in the partnership and the partnership still retained the investment as cash at the end of the tax year, it would be a current asset considered in our determination of the petitioner's ability to pay the proffered wage that year. However, we do not consider partners' capital accounts as funds available to pay the proffered wage as they are not considered to be current assets. Therefore, the AAO will not consider the petitioner's "other investments," "other assets," or

---

<sup>9</sup> It is possible that this difference would have been addressed in the accountant's notes to the financial statements; however, those notes were not submitted to the record.

“partners’ capital accounts” when evaluating the petitioner’s continuing ability to pay the proffered wage of \$51,272.

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

In the instant case, the petitioner’s tax returns indicate it was established on January 24, 2000. The petitioner has provided its tax returns for 2001 through 2007, with the 2001 through 2003 and 2007 tax returns not establishing the petitioner’s ability to pay the proffered wage of \$51,272. Furthermore, the petitioner has filed at least two additional nonimmigrant petitions in 2005 and 2006. Therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. 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, 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 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 9089 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

The AAO finds that the petitioner did have sufficient funds to pay the proffered wage and the wages of the additional nonimmigrant beneficiaries in 2004 through 2006. In addition, the AAO notes that the petitioner did not begin operating until June of 2002 and that the petitioner’s gross receipts

increased from approximately 2 ½ million in 2002 to approximately 12 ½ million in 2007. Furthermore, the AAO also notes that the petitioner paid salaries ranging from \$380,549 in 2002 to \$972,538 in 2007, and had cost of labor expenses ranging from \$1,064,363 in 2002 to \$2,358,133 in 2007. It appears that the year 2001 was an uncharacteristic year for the business in that the petitioner was under the construction phase that year and half of 2002. The petitioner has submitted several articles from websites (accessed on August 20, 2009)<sup>10</sup> attesting to its history,<sup>11</sup> its restaurants,<sup>12</sup> and its reconstruction.<sup>13</sup> Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage from the priority date of April 27, 2001 if the petitioner can provide evidence that it did employ more than 100 workers in the pertinent years.

Beyond the decision of the director, the letter submitted to document the beneficiary's experience is insufficient. 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). The ETA Form 750 requires that the beneficiary possess two years of experience as an assistant manager.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides that:

(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.

In the instant case, the experience letter submitted as evidence of the beneficiary's experience states:

---

<sup>10</sup> <http://www.washingtontimes.com>, <http://archive.deseretnews.com>, <http://www.fodors.com>, <http://www.capemaytimes.com>, and <http://www.professionaltravelguide.com>.

<sup>11</sup> Each article notes that the petitioner was opened in 1816, was burned down twice, and was visited by such notables as Presidents Benjamin Harrison, Ulysses S. Grant, Franklin Pierce, and James Buchanan, and by John Philip Sousa.

<sup>12</sup> The articles note that the petitioner's Blue Pig Tavern has two dining rooms – one is gardenlike while the other, the Boiler Room, is more a tavern scene. In addition, the petitioner has a grand ballroom and is across the street from the Atlantic Ocean with a private beach where food service and cabanas are available.

<sup>13</sup> One of the articles notes that “the top to bottom make over – from a new roof with more than 18,000 slate shingles to 11 miles of plumbing –cost a staggering \$22 million.” Another article notes that renovating the hotel took 2 ½ years.

[The beneficiary] worked for me as an assistant manager at Via Regia, an upscale 120+ seat Italian restaurant, from October 1996 to May 1999. He assisted in the hiring and training of wait, bus and bar staff, and the maintaining of liquor and beer inventories in addition to the daily responsibilities of his position which included the greeting and seating of customers, overseeing staff during service and performing end of night shift reports and drops.

\* \* \*

I also entrusted [the beneficiary] to ensure that the bar and restaurant receipts were accounted for at the end of night and in my absence preparing the deposits for the next day and settling and balancing the credit card receipts.

However, the experience letter does not meet the requirements of 8 C.F.R. § 204.5(1)(3) as it does not give the title of the employer and does not state whether the employment was full-time or part-time. The beneficiary claims that he attended school and worked simultaneously between October 1996 and May 1999 (The beneficiary obtained his degree in 1999.); that he attended Kaunas Tech University weekday mornings and afternoons; and that he worked during dinner hours at Via Regia part-time on those evenings, usually four hours per night, and then full-time on the weekends. However, the letter of experience must be provided by the beneficiary's prior employer and not by the beneficiary. Therefore, the letter is insufficient to demonstrate that the beneficiary has two years of full-time experience in the position offered, and the petitioner has failed to adequately document that the beneficiary has the required experience to meet the terms of the certified labor certification.<sup>14</sup>

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

In the instant case, the petitioner has submitted a copy of the beneficiary's diploma and appropriate transcripts with translations that indicate that the beneficiary obtained a Bachelor of Fine Arts in Modern International Economics in 1999. However, the petitioner has not submitted an education evaluation that shows that the beneficiary's foreign degree is equivalent to a U.S. baccalaureate degree. Therefore, the petitioner has not shown that the beneficiary meets the educational requirements of the labor certification.

---

<sup>14</sup> The AAO considers full-time employment to consist of a minimum of 35 hours per week.

The director must afford the petitioner reasonable time to provide evidence relevant to the beneficiary's experience and training, evidence establishing that the beneficiary's foreign degree is equivalent to a U.S. baccalaureate degree, and evidence that the petitioner has employed 100 or more workers in the pertinent years, 2001 through 2007. In addition, the Form ETA 9089 must be signed by the alien beneficiary, counsel and the petitioner at Section L, Section M and Section N, respectively. *See* 20 C.F.R. § 656.17(a)(1).<sup>15</sup> The director may request any other evidence that he deems appropriate. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

---

<sup>15</sup> To be valid, the Form ETA 9089 must be signed by the alien beneficiary, counsel, and the petitioner at Section L, Section M and Section N, respectively. *See* 20 C.F.R. § 656.17(a)(1). 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*, 229 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). Ordinarily, the AAO would deny a petition that does not include the signature of the beneficiary, counsel, and the petitioner. However, as the AAO is remanding the petition back to the director on other issues, the AAO feels it is in the best interest of the parties concerned to allow the beneficiary, counsel, and the petitioner to sign the Form ETA 9089.