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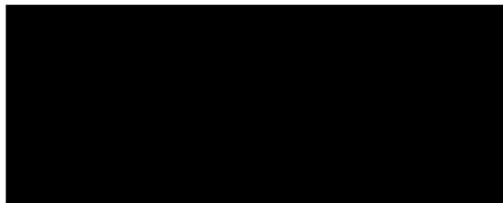
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

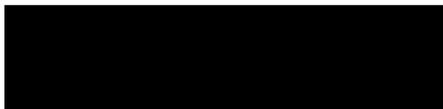
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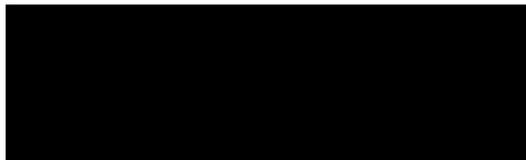
FILE: LIN 07 026 52899 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



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:

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

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

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage. The director 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 denial, an 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.

Additional issues beyond the decision of the director are whether the petitioner may materially amend the petition on appeal, and, also on appeal, whether the petitioner may now include another entity to join with it as the petitioner, and then to demonstrate by their combined assets, the two corporations' joint ability to pay the proffered wage.

Further, beyond the decision of the director, another issue is whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Finally, beyond the decision of the director, an additional issue is whether the petition must also be denied because the beneficiary may not be found qualified for classification as an other, unskilled worker.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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 at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on February 9, 2004. The proffered wage as stated on the Form ETA 750 is \$11.20 per hour (\$23,296.00 per year).

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.

On November 20, 2007, the director issued a Request for Evidence (RFE) asking for the petitioner to submit information, *inter alia*, regarding the petitioner's ability to pay the proffered wage from the priority date onward.

Counsel responded on December 13, 2007, and submitted, *inter alia*, the petitioner's federal tax returns Forms 1120S for 2004, 2005, and 2006.

On appeal, counsel submits a legal brief dated May 27, 2008; an affidavit from the petitioner dated May 27, 2008, and financial statements for [REDACTED], dated December 31, 2004, 2005, 2006, and 2007, referencing to an accountant's compilation report.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1987 and to currently employ 29 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 6, 2004, the beneficiary did not claim to have worked for the petitioner as he resides in the People's Republic of China.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application 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 has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004 or subsequently as the beneficiary is a resident of the People's Republic of China.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not

represent current use of cash, neither does it represent amounts available to pay wages.

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

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

The record before the director closed on December 13, 2007, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 was the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120S stated net income<sup>1</sup> of \$27,353.00.
- In 2005, the Form 1120S stated net income of <\$4,328.00>.<sup>2</sup>
- In 2006, the Form 1120S stated net income of \$14,538.00.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>3</sup> A corporation’s year-end current assets are shown

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<sup>1</sup> Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 16, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, deductions, and other adjustments shown on its Schedule K for 2004, 2005, and 2006, the petitioner’s net income is found on Schedule K of tax returns.

<sup>2</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>3</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities,

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 returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$2,850.00.
- In 2005, the Form 1120S stated net current assets of \$5,157.00.
- In 2006, the Form 1120S stated net current assets of <\$32,742.00>.

Therefore, for years 2004, 2005, and 2006, the petitioner the petitioner through an examination of its net current assets did not have the ability to pay the proffered wage.

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

Additional issues beyond the decision of the director are whether the petitioner may now include another entity to join with it as the petitioner, and then to demonstrate by their combined assets, the two corporations' joint ability to pay the proffered wage, and whether the petitioner may materially amend the petition on appeal.

#### *The Identity of the Petitioner and Employer*

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

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

\* \* \*

"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. 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.

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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 petitioner and employer are identified in the petition as well as the labor certification as a restaurant. The federal Employer Identification Number (EIN) stated on the I-140 petition for the petitioner is [REDACTED] which is [REDACTED] EIN. A plain reading of the record demonstrates that the petitioner is Sands Hospitality, Inc. which is specifically identified by its EIN.

#### *Another Entity's Assets*

Counsel contends that with the addition of the financial resources of another corporation, [REDACTED] the petitioner has the ability to pay the proffered wage. According to counsel, the restaurant and bar were established in 1987 doing business as [REDACTED], and in combination have 30 to 35 employees. According to the common controlling shareholder of both [REDACTED] and [REDACTED], the two companies always "made payroll."

Counsel further states that in the petition as filed, financial information was initially only submitted for [REDACTED] when it should also have submitted financial information for [REDACTED] Incorporated, a separate entity.<sup>4</sup> According to counsel the petitioner operates the café, i.e. the restaurant, and [REDACTED] operates the bar business, but both entities share the same physical space. It is clear that counsel is attempting to amend the petition at this late date to include another entity and at the same time introduce another entity's, i.e. [REDACTED] compiled and unaudited financial statements as proof of the two corporation's joint ability to pay.

Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Further, assuming for the sake of argument that Lews Incorporated has standing in this matter, its compiled and unaudited financial statements are insufficient evidence under the regulations at 8 C.F.R. § 204.5(g)(2) of the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its

<sup>4</sup> Also known as [REDACTED] A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

#### *Totality of Circumstances*

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

In the instant case, counsel is contending that two corporations, [REDACTED], [REDACTED], are responsible to pay the proffered wage. Other than this assertion, there is insufficient evidence submitted of the petitioner's financial solvency and viability since 2005, and no allegation of any temporary and uncharacteristic disruption in its business activities to account for its poor financial returns. Counsel is requesting that this matter should be re-examined, after the director's review, because new evidence has been submitted on appeal for another entity, Lews Incorporated.<sup>5</sup>

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<sup>5</sup> The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the

Based upon the totality of counsel's and the petitioner's statements, it is clear it is their contention that the financial resources of [REDACTED] are insufficient to demonstrate a continuing ability to pay the proffered wage. This contention does not conflict with the evidence submitted in the record. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner may not include another entity to undertake its obligations as both the petitioner and employer, or use another entity's assets to demonstrate its ability to pay the proffered wage. Further, the petitioner may not materially amend the petition on appeal. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. The evidence submitted does not establish that the petitioner had the ability to pay the proffered wage in 2005 and 2006.

Another issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The Form ETA 750 was accepted on February 9, 2004, and states that the position requires two years experience as a Chinese Cook. The petitioner must 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, Part A, Line 13, describes the job duties of Chinese Cook as follows:

Prepare and cook Chinese food from basic ingredients. Prepare Chinese barbeque.

The Form ETA 750, Part A, Line 15, "Other Special Requirements" states:

Must have experience cooking in a Chinese Restaurant. Must be able to work a schedule consistent with restaurant hours. Must be able to prepare Chinese barbeque (pigs, ducks, chickens, etc.).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides:

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.

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requested evidence and now submits it on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO may reject such evidence.

The beneficiary stated a prior employment experience at [REDACTED] located in the People's Republic of China, as a Chinese cook, and stated his job duties as "Preparing and cooking Chinese food from basic ingredients. Prepare Chinese barbeque including pigs, ducks and chickens."

On November 20, 2007, the director issued a RFE asking for the petitioner to submit information regarding the beneficiary's work experience before the priority date.

In response, the petitioner on December 13, 2007, submitted a native language statement with its translation notarized on October 31, 2003, from [REDACTED] located in Dajiang Town, Taishan City, Guangdong Province, the People's Republic of China.

The brief statement was as follows:

This is to certify that [the beneficiary] worked at [REDACTED] of Dajiang Town, Taishan City, Guangdong Province from July 1997 to October 2000, his job was to cook dishes, and that from November 2000 to the present, he works as a cook at the restaurant mentioned above, his job is to cook dishes.

This statement is insufficient evidence to demonstrate that the beneficiary has the job experience to satisfy the offered job requirements as stated above, or sufficient evidence based upon the one brief job reference letter that he acquired the necessary experience at [REDACTED]. There is no indication who was the beneficiary's trainer, and no mention of the kinds of foods prepared. Therefore, the sole statement submitted in the record concerning the beneficiary's qualifications is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. No other letters or statements according to the regulation at 8 C.F.R. § 204.5(l)(3) were submitted by the petitioner. Other than the beneficiary's statements in the Form ETA 750, Part B, of his work experience at the Lianxing Restaurant, and the labor certification's job duties, which are almost identical to the above offered job description, there is no other description of the beneficiary's job experience.<sup>6</sup>

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the petition must also be denied because the beneficiary may not be found qualified for classification as an other, unskilled worker.

As noted above, 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 other qualified immigrants who are capable, at the time of

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<sup>6</sup> Counsel stated that one reason that the petitioner is sponsoring the beneficiary is that he has family members now employed with the petitioner.

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. Section 203(b)(3)(A)(i) of 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.

Here, the Form I-140 was filed requesting in part 2.g. of the Form I-140, the classification as an other, unskilled worker. The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the position requires two years experience. However, the petitioner requested the unskilled worker classification on the Form I-140. Accordingly, the petition may not be approved in the unskilled worker category because the petition and Form ETA 750 require at least two years of experience or training. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Accordingly, the petition must be denied for this additional reason.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.<sup>7</sup> 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.

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<sup>7</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d at 1002 n. 9.