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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



B6

Date:

DEC 13 2011

Office: NEBRASKA SERVICE CENTER



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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 an apartment rental company. It seeks to employ the beneficiary permanently in the United States as a clean-up-person (groundskeeper). 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 (DOL). 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.

On April 27, 2011, this office sent a request for additional evidence to the petitioner. The AAO requested that the petitioner submit evidence establishing that [REDACTED] [REDACTED] are successors-in-interest to the petitioner, and to each other. The AAO also requested that the petitioner provide evidence of any tax liens or assessment against [REDACTED] [REDACTED] (which would show that it is a continuing business concern) including sales and use tax delinquencies from 2001 to date, and documentary evidence from [REDACTED] [REDACTED] of the transfer and assumption (including the date) of the ownership and liabilities of [REDACTED] to [REDACTED] and [REDACTED] [REDACTED] as the claimed successors.

The petitioner was asked to submit a copy of its Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, for the 2003, 2004, 2006, 2007, and 2008 federal tax years along with complete certified copies of its IRS income tax returns; complete with all pages and all schedules and attachments for those years or copies of annual reports or audited financial statements for the relevant years.

The petitioner was asked to submit a certified copy of [REDACTED] 2005 and 2007 tax returns or audited financial statements, and a certified copy of [REDACTED] 2008 tax return or audited financial statement.

The AAO requested that the petitioner submit a copy of the beneficiary's Forms W-2, Wage and Tax Statements or 1099-MISC tax documents for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010, and to indicate whether the beneficiary was employed by the petitioner on a full-time basis and the number of hours the beneficiary worked per week.

The petitioner was asked to provide conclusive evidence to demonstrate that the beneficiary had three months of experience as of the filing date of the labor certification application, April 30, 2001, to perform the job as a clean-up-person (grounds cleaner), and the duties the petitioner described in the labor certification application accordingly.

The petitioner responded to the AAO's request with a copy of [REDACTED] Forms 1065 for 2001, 2002, 2004, 2005, 2006, 2007, and 2008; a copy of employee summary payment reports for 2007, 2008, 2009, and 2010; a copy of IRS Forms W-2 for the beneficiary for the years 1998, 2002, 2003, 2004, and 2005; and a copy of IRS Forms 1099-MISC issued to [REDACTED] and [REDACTED] for 2007, 2008, 2009, and 2010. The petitioner also provided a copy of pay stubs issued by [REDACTED] to the beneficiary for August 26, 2008 and from [REDACTED] to the beneficiary for September 3, 2008. The petitioner also provided an employment letter written by a representative of [REDACTED]. The evidence received from the petitioner will be taken into consideration by the AAO in examining the petitioner's claims. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 May 22, 2009 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13,686.00 per year. The Form ETA 750 states that the position requires three months experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established in 1979 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, the beneficiary claimed to have worked for the petitioner since February 1998.

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'l Comm'r 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'l Comm'r 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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

² 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.

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. The proffered wage is \$13,686.00. In the instant case, the petitioner submitted copies of IRS Forms W-2 as listed below.

- In 2001, the petitioner did not provide evidence that it paid wages to the beneficiary.
- In 2002, the Form W-2 stated wages of \$7,843.00 (a deficiency of \$5,843.00).
- In 2003, the Form W-2 stated wages of \$9,859.00 (a deficiency of \$3,827.00).
- In 2004, the Form W-2 stated wages of \$942.00 (a deficiency of \$12,744.00).³
- In 2005, the Form 1099-MISC stated compensation of \$16,112.00.
- In 2006, the petitioner did not provide evidence that it paid wages to the beneficiary.
- In 2007, the petitioner did not provide evidence that it paid wages to the beneficiary.⁴
- In 2008, the petitioner did not provide evidence that it paid wages to the beneficiary.⁵
- In 2009, the petitioner did not provide evidence that it paid wages to the beneficiary.⁶
- In 2010, the petitioner did not provide evidence that it paid wages to the beneficiary.⁷

Therefore, the petitioner has failed to establish its ability to pay the proffered wage in 2001, 2006, 2007, 2008, 2009, and 2010; or its ability to pay the entire proffered wage amounts in 2002, 2003, and 2004.

If, as in this case, 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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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*

³ The petitioner submitted Form W-2 evidence from [REDACTED] for 2004. However, the record does not establish that this entity is a successor-in-interest to the petitioner, and wages paid by this other entity will not be considered.

⁴ The petitioner provided IRS Forms 1099-MISC for 2007, 2008, 2009, and 2010 that were issued to [REDACTED] as payee and [REDACTED] and [REDACTED] as payers. There is no evidence in the record to demonstrate that the beneficiary is [REDACTED] or that a successor-in-interest relationship exists between [REDACTED] and [REDACTED] and [REDACTED] and [REDACTED] and [REDACTED]. Therefore, the AAO will not consider the compensation amounts for those years in assessing the petitioner's ability to pay the proffered wage.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

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.

In *K.C.P. Food*, 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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 as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net income of \$246,252.00.⁸

⁸ For an LLC taxed as 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 page one of the petitioner's 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 entries for additional income or additional

- In 2002, the petitioner's Form 1065 stated net income of \$607,818.00.
- In 2003, the petitioner did not provide a Form 1065.
- In 2004, the petitioner did not provide a Form 1065.⁹
- In 2005, the petitioner's Form 1065 stated net income of -\$11,851.00.
- In 2006, the petitioner did not provide a Form 1065.¹⁰
- In 2007, the petitioner did not provide a Form 1065.¹¹
- In 2008, the petitioner did not provide a Form 1065.¹²

credits, deductions or other adjustments, net income is found on page 4 (before 2008) or page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>. (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule K has relevant entries for additional income, credits, deductions, or other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

⁹ The petitioner submitted as evidence a copy of a Form 1065 for [REDACTED] with a Federal Employer ID number (EIN) of [REDACTED]. It is noted that the petitioner, [REDACTED] has a different EIN number of [REDACTED]. There is no evidence in the record to demonstrate a successor-in-interest relationship between the two business entities. Therefore, the net income amounts for 2004 and 2006 will not be considered by the AAO in assessing the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). 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."

¹⁰ *Id.*

¹¹ The petitioner submitted as evidence a copy of a Form 1065 for HRA [REDACTED] with a Federal Employer ID number (EIN) of [REDACTED]. It is noted that the petitioner, [REDACTED] has a different EIN number of [REDACTED]. There is no evidence in the record to demonstrate a successor-in-interest relationship between the two business entities. Therefore, the net income amount for 2007 will not be considered by the AAO in assessing the petitioner's ability to pay the proffered wage.

¹² The petitioner submitted as evidence a copy of a Form 1065 for [REDACTED] with a Federal Employer ID number (EIN) of [REDACTED]. It is noted that the petitioner, [REDACTED] has a different EIN number of [REDACTED]. There is no evidence in the record to demonstrate a successor-in-interest relationship between the two business entities. Therefore, the net income amount for 2008 will not be considered by the AAO in assessing the petitioner's ability to pay the proffered wage.

Therefore, for the years 2003, 2004, 2006, 2007, and 2008 the petitioner did not establish that it had sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage in 2003 and 2004.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹³ 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 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 2003, the petitioner did not provide a Form 1065.
- In 2004, the petitioner did not provide a Form 1065.
- In 2006, the petitioner did not provide a Form 1065.
- In 2007, the petitioner did not provide a Form 1065.
- In 2008, the petitioner did not provide a Form 1065.

Therefore, for the years 2003, 2004, 2006, 2007, and 2008, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage in 2003 and 2004.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the 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.

On appeal, the petitioner asserts that it has submitted sufficient evidence to demonstrate that it does possess the ability to pay the proffered wage. The petitioner further asserts that the evidence should be viewed in its entirety.

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

¹³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. Overall, given the record as a whole, the petitioner has not established that the job offer was credible in 2001 or subsequently.

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

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has three months experience in the job offered or in a related occupation. On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a "grounds keeper." The petitioner submitted a letter of employment dated August 4, 2008, from [REDACTED] who stated that the beneficiary was employed by [REDACTED] from December 1999 through August 2006, as a janitor. However, this employment letter does not include a specific description of the job duties performed by the beneficiary or the title of the declarant. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). The petitioner submitted a letter dated September 19, 2008 from a representative of [REDACTED] who stated that the beneficiary was employed by the company from June 2, 1997 to July 11, 1999 as a part-time janitor. This employment letter does not indicate that the beneficiary was employed full-time nor does it list the title of the declarant. The letter also fails to describe the job duties performed by the beneficiary.

Furthermore, the beneficiary indicated on the Form ETA 750 that she was employed by [REDACTED] [REDACTED] from February 1998 to May 1998. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). As these inconsistencies are not resolved, the AAO cannot determine that the beneficiary has the requisite experience or that she is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner has failed to establish the beneficiary's qualifications as of the priority date. For this additional reason, the petition may not be approved. 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 Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the Form ETA 750 is not valid for the offered position. The wage amount offered by the petitioner to the beneficiary in the Form I-140 is \$176.00 per week (\$9,152.00 per year). In contrast, the wage amount offered by the petitioner to the beneficiary in the Form ETA 750 is \$8.10 per hour based upon a 40 hour work week (\$16,848.00 per year). The wage amount listed on the I-140 petition is less than the wage amount listed by the petitioner on the Form ETA 750; therefore, the two are considered to be different job opportunities. 20 C.F.R. § 656.30(c)(2). A job opportunity as clean-up person at \$9,152.0 per annum has not been certified by the DOL.

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.