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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

PUBLIC COPY



B6

Date: **MAY 03 2011** Office: TEXAS SERVICE CENTER

FILE: 

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:

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: On July 31, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an immigrant petition for alien worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on August 11, 2003. The director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on June 30, 2009, and the petitioner subsequently appealed the director's decision to revoke approval of the visa petition. On June 29, 2010, the Administrative Appeals Office (AAO) issued a notice of derogatory information and request for evidence (NDI/RFE) to the petitioner. The petitioner timely responded to the NDI/RFE. The appeal will be dismissed.

The petitioner is a franchisee of Wendy's Old Fashion Hamburgers (Wendy's) in Massachusetts. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).¹

As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification.

The petitioner must demonstrate, among other things, that, 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 Department of Labor (DOL) – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on June 22, 2001. The petitioner sought to hire an experienced cook. The Form ETA 750 specifically required the applicant to have a minimum of two years experience in the job offered. Under the job description, the petitioner stated that the job to be performed included “preparing all types of dishes.”

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

¹ 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.

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, signed by the beneficiary on January 5, 2001, she represented that she worked as a cook at a restaurant in Brazil called "[REDACTED]" from January 1994 to February 1997. Submitted along with the approved Form ETA 750 and the petition was a signed declaration dated January 17, 2001 from [REDACTED], former owner of [REDACTED], stating that the beneficiary worked as a cook at the restaurant from 01/13/1994 (January 13, 1994) to 12/02/1997 (December 2, 1997).

The record shows that the Form ETA 750 was certified by the DOL on June 28, 2002. Following the approval of the Form ETA 750, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on July 31, 2002. As stated above, the I-140 petition was approved by the director of the VSC on August 11, 2003.

An investigation conducted by Office of Inspector General, Office of Labor Racketeering and Fraud Investigations (OLRFI) found fraud in numerous immigrant visa petitions that the beneficiary's former attorney of record, [REDACTED] filed. As [REDACTED] filed the petition in this case, USCIS – TSC found an increased possibility of fraud in the instant case and sent a notice of intent to revoke (NOIR) to the petitioner on February 6, 2009. The director advised the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years work experience in the job offered before her labor certification application was filed with the DOL for processing and that the petitioner complied with all of the DOL recruiting requirements.

In response to the director's NOIR, the petitioner provided the following evidence:

- A letter from the beneficiary stating that she did work as a cook at [REDACTED] in Brazil from 1/13/1994 to 12/2/1997 and that she no longer had any records to prove her employment there since it had been a long time ago;
- The [REDACTED] printout of the beneficiary's former employer in Brazil;²
- A copy of a newspaper advertisement that the petitioner posted on *Boston Herald* in 2001 to recruit workers; and
- A letter from the petitioner stating that the beneficiary had been employed as a full-time worker since November 1998.

Upon receipt, the director determined that the petitioner had failed to demonstrate that the beneficiary had the requisite two years of work experience in the job offered before it filed the labor certification form with the DOL in June 2001. The director acknowledged that the business in Brazil was active during the period the beneficiary claimed she worked there, but the beneficiary's letter alone was not sufficient to show that she worked there. Moreover, the director stated that the submission of the copy of the advertisement in and of itself did not demonstrate that the petitioner complied with the DOL recruitment requirements. The director

² CNPJ is a database which shows all businesses in Brazil, with each company having a unique CNPJ number.

also indicated that the petitioner failed to submit copies of the in-house postings. For these reasons, the director revoked the approval of the visa petition.

On appeal, counsel for the petitioner contends that the director's decision to revoke the previously approved petition was erroneous, because it was not based on good and sufficient cause, as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155.³ Counsel claims that the allegations contained in both the NOIR and the notice of revocation (NOR) are not supported by documentary evidence. For instance, according to counsel, the NOIR contains no specific evidence that would have warranted a revocation; it contains only vague allegations of fraud in other petitions filed by [REDACTED] and similarities in the description regarding recruitment efforts present in the petitioner's labor certification application and other unrelated applications filed by [REDACTED]. Further, counsel states that the NOIR includes no specific evidence or information relating to the petitioner, petition, or documents in the present case. Counsel states that where a notice of intent to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the director cannot revoke the approval of the visa petition, citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988).

Counsel states that the director in his notice of revocation claims that the petitioner did not comply with the DOL recruitment requirements on the basis that other unrelated cases were found to contain doubtful information. Counsel states that the director in his decision did not present any evidence supporting his finding that the Form ETA 750 pertaining to this specific case was not signed by the instant petitioner. Counsel faults the director for failing to attach the investigative report conducted by OLRFI in connection with other cases that Mr. Dvorak filed. For these reasons, counsel concludes that the director did not have good and sufficient cause to revoke the previously approved petition, as required in the applicable regulation.

The following evidence was submitted along with the appeal:

- A sworn statement dated July 6, 2009 by the owner of [REDACTED], affirming that the beneficiary worked at the restaurant from January 13, 1994 to December 2, 1997 as a cook in charge of preparing food and different kinds of dishes [sic]; and
- A sworn statement dated July 29, 2009 from the petitioner stating that the beneficiary was properly recruited following the DOL recruitment procedures, and that the DOL approved the labor certification application because there were no other U.S. candidates who were interested or qualified to work in the beneficiary's position at that time.

In adjudicating the appeal, the AAO found several inconsistencies in the record pertaining to the beneficiary's past work experience as a cook in Brazil. On June 29, 2010, the AAO sent the petitioner an NDI/RFE in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i). In the NDI/RFE, the AAO specifically indicated that the beneficiary claimed she worked as a cook for

³ Section 205 of the Act, 8 U.S.C. § 1155, states, "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause revoke the approval of any petition approved by him under section 1154 of this title."

██████████ from January 1994 to February 1997 on the Form ETA 750B. However, the beneficiary failed to list her employment at that place on her Biographic Information, Form G-325, under a section eliciting information about her work experience abroad. Further, the beneficiary listed on the Form G-325 that she started to work for the petitioner in 1999; however, the letter from the petitioner submitted in response to the director's NOIR stated that the beneficiary started her employment with the petitioner in November 1998. Due to these inconsistencies in the record, the AAO specifically advised the petitioner to submit independent objective evidence such as pay stubs, tax documents, financial statements, or other evidence of payments made to the beneficiary by her previous employer in Brazil.

On July 28, 2010, the AAO received a brief from the petitioner's counsel of record and additional evidence pertaining to the beneficiary's work experience in Brazil. In his brief, counsel contends that the beneficiary has submitted and provided sufficient evidence and detailed explanation to demonstrate that she worked as a cook in Brazil for at least two years, before she came to the U.S. in 1997. He states that no tangible evidence such as copies of paystubs, payroll records, or other evidence can be produced due to the passage of time. Citing 8 C.F.R. § 204.5(g)(1), counsel urges that the evidence submitted below should be considered as credible. Counsel states, "To require any further objective evidence from the beneficiary would be overly burdensome and unreasonable, especially considering that the employment was performed between 1994 and 1997, over fifteen years ago in a country abroad."

Counsel also asserts that the inconsistencies in the record pertaining to the beneficiary's work experience in Brazil and in the U.S. are due to her limited English language skills. Counsel claims that the beneficiary came to the U.S. in 1997 from Brazil, and when she filed the labor certification application and the immigrant visa petition in 2001 and 2002 the beneficiary barely understood the English language and reasonably relied on her then attorney (██████████) to complete her paperwork. According to counsel, the beneficiary simply signed her name reasonably assuming all information was accurate. Thus, counsel concludes that any errors and omissions in the petition and other applications were not the beneficiary's fault but her attorney's.

In addition, counsel states that the director's finding of willful misrepresentation or fraud against the petitioner and/or the beneficiary is without merit, since none of the omissions or inconsistencies in the record is material.

The following evidence was submitted to support counsel's assertions:

- A signed statement from the beneficiary stating that she had never seen ██████████ when she filed the labor certification and the immigrant visa petition, that she only spoke with his paralegal who was Brazilian, that the paralegal filled out all the applications and simply told her to sign her name on the applications, and that she signed the applications believing that everything was done correctly;
- A signed statement from the beneficiary claiming that she no longer has any proof to show that she worked as a cook in Brazil since her house where she and her family used to reside had termite and water problems, and all of the evidence such as pictures was destroyed because of these problems; and

- A signed statement from the beneficiary's former co-worker attesting to the beneficiary's employment as a cook at [REDACTED].

The record shows that the appeal is timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon *de novo* review, the AAO finds that the director's findings that the beneficiary did not have the requisite two years experience in the job offered before the petitioner filed the labor certification application and that the petitioner did not comply with the DOL recruiting requirements are erroneous and will be withdrawn.

The beneficiary claims in her signed statement that the reason why she failed to list her employment abroad on her biographic information form was because a paralegal in [REDACTED] office helped her to complete the form, and any error or missing information was made by the paralegal. She states that she did not read and understand English at that time to know if there was inaccurate or missing information and only signed the form based on the information she provided.⁴ A failure to apprise oneself of the contents of documents before signing them is generally not recognized as a defense to misrepresentation. *See, e.g., Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) and *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993)).

Upon review, the AAO finds that the sworn statements of the beneficiary's employer in Brazil coupled with the signed statements of the beneficiary sufficiently demonstrate that the beneficiary is qualified to perform the duties of the position. The CNPJ printout shows that the business in Brazil was established in December 1990 and appeared to be active during the period of the beneficiary's employment.

The sworn statements by the former owner of the restaurant in Brazil comply with the regulation at 8 C.F.R. § 204.5(g)(1), in that they contain the author's name, address, title, and description of the beneficiary's job duties.

The information on the Form ETA 750B pertaining to the beneficiary's employment in Brazil is consistent with the evidence submitted. Under these circumstances, we find that the petitioner has established by a preponderance of the evidence that the beneficiary worked as a cook in Brazil for at least two years and had the requisite work experience in the job offered as of the priority date.

The AAO also notes that the basis of the director's finding of fraud or willful misrepresentation against the petitioner was the fact that the petitioner had failed to submit copies of the in-house postings. On appeal, in a letter dated July 28, 2009, the petitioner's Vice-President of Operations outlined the internal recruitment efforts undertaken by the petitioner in an attempt to fill the

⁴ The office of [REDACTED] the beneficiary's previous attorney, represents itself as fluent in Portuguese. [REDACTED]

position, including the in-house posting. The petitioner's statement is consistent with evidence of the petitioner's external attempts at recruitment for the position through an advertisement in a newspaper of general circulation. The AAO withdraws the director's finding of fraud and willful misrepresentation.

Nevertheless, the immigrant visa petition may not be approved since the petitioner has not established its ability to pay the proffered wage. 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).

As noted above, the petitioner filed the labor certification application (Form ETA 750) for the beneficiary with the DOL on June 22, 2001. The rate of pay or the proffered wage set forth by the DOL is \$13.01 per hour or \$23,678.20 per year (based on a 35-hour work per week).⁵

In response to the AAO's NDI/RFE, the counsel submits copies of the following evidence to demonstrate that the petitioner has the ability to pay \$13.01 per hour or \$23,678.20 per year beginning on June 22, 2001:

- The beneficiary's Forms W-2 for 2001 and 2003 through 2009;
- The beneficiary's most recent social security statement; and
- A letter from [REDACTED] stating that he is the president of the petitioning company, that his company employs 250 employees, and that his company has the continuing ability to pay the beneficiary's wage.

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

⁵ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

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, 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 Sonegawa*, 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.

Based on the evidence submitted, we find that the beneficiary received the following wages from the petitioner:

| Tax Year | Actual wage (AW) (Box 1, W-2) | Yearly Proffered Wage (PW) | AW minus PW |
|----------|-------------------------------|----------------------------|---------------|
| 2001 | \$30,319.82 | \$23,678.20 | Exceeds PW |
| 2002 | not submitted | \$23,678.20 | not available |
| 2003 | \$29,788.49 ⁶ | \$23,678.20 | Exceeds PW |
| 2004 | \$32,051.95 ⁷ | \$23,678.20 | Exceeds PW |
| 2005 | \$36,118.21 | \$23,678.20 | Exceeds PW |
| 2006 | \$39,448.44 | \$23,678.20 | Exceeds PW |
| 2007 | \$43,330.98 | \$23,678.20 | Exceeds PW |
| 2008 | \$45,909.32 | \$23,678.20 | Exceeds PW |
| 2009 | \$54,109.55 | \$23,678.20 | Exceeds PW |

The W-2s submitted are *prima facie* evidence of the petitioner's ability to pay the beneficiary's proffered wage of \$23,678.20 per year for 2001 and for the years 2003 through 2009. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to show that it paid the beneficiary in 2002 as well. The evidence submitted does not show that the beneficiary received any wages in 2002.

⁶ The beneficiary received two (2) Forms W-2 from the petitioner for 2003 for a total of \$29,788.49. One form showed that she received \$25,218.33, and the other showed that she received \$4,570.16.

⁷ The beneficiary received two (2) Forms W-2 from the petitioner for 2004 for a total of \$32,051.95. One form showed that she received \$25,703.29, and the other showed that she received \$6,348.66.

When 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 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 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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.⁸

A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner fails to submit copies of its federal tax returns, annual reports, or audited financial statements for any year during the qualifying period. Due to this lack of evidence, the AAO cannot find that the petitioner has the continuing ability to pay the proffered wage from the priority date.

earlier stated in his letter dated January 12, 2001⁹ that the company's tax returns were privately held and that he could not produce those documents. stated in that letter that he employed 175 people and that the company had an annual payroll of \$2,076,598 and gross annual income of \$7,869,459. In his most recent letter to the AAO, states that his company currently employs 250 workers.

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." (Emphasis added.)

Given that there is no corroborating evidence supporting statements about the size, annual payroll, and gross annual income of his company, this office elects not to use its discretion to accept the letters from . As noted earlier, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of the beneficiary it is seeking to employ.

Finally, 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

⁸ 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.

⁹ This letter was submitted along with the petition that initially submitted to USCIS on July 31, 2002.

I&N Dec. 612. The petitioning entity in *Sonegawa* 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 *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.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner, especially in 2002 had uncharacteristically substantial expenditures.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the relevant evidence, the AAO is not persuaded that the petitioner has that ability. We conclude that the petitioner has not met the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage continuously from the priority date.

In addition, the immigrant visa petition may not be approved as evidence of record appears more likely than not that the beneficiary will not be employed in the proffered position as a cook. The petitioner claims in its affidavit dated July 28, 2009, that it still intends to employ the beneficiary in the job "as stated in the I-140 petition" or as a cook. However, in the petitioner's February 18, 2009 letter, the petitioner claims the beneficiary is employed "full time doing salad prep, chili prep, making sandwiches, and operating the grill; along with receiving inventory and scheduling of employees." The AAO also notes that in the beneficiary's most recently submitted Biographic Information (Form G-325), the beneficiary indicates her occupation is "general manager/cook."

Further, the beneficiary's most recent W-2 shows she made \$54,109.55.¹⁰ Under these sets of circumstances, we find that it is more likely than not that the beneficiary is a general manager and not a cook. The appeal will be dismissed 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. 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. The director's previous approval of the petition remains revoked.

¹⁰ This annual salary seems too high for a cook position at Wendy's.