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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services



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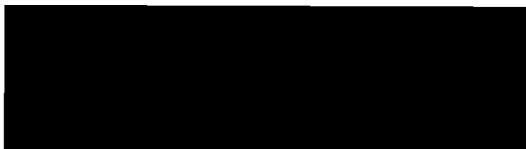
IN RE:

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be remanded to the director in accordance with the following.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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. 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 July 31, 2008 decision, the 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. In addition to the issue of whether the petitioner has the ability to pay the proffered wage, the labor certification in the record is not signed¹ by the beneficiary, a representative of the petitioner, or counsel.² Additionally, the record contains significant discrepancies in the beneficiary's claimed experience.

¹ See 20 C.F.R. § 656.17(a)(1): "DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent."

² It is noted that the beneficiary's address listed on the Form I-140 and ETA Form 9089 is the same as the address listed for the petitioner's president on the Massachusetts Secretary of State website. See <http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=000875090> (accessed September 2, 2011).

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

Where the petitioner is owned by the person applying for position, it is not a bona fide offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

An occupational preference petition may be filed on behalf of a prospective employee who is related to a shareholder in the corporation. The prospective employee's relationship to the shareholder, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her familial relationship constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 CFR § 656.30(d). See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

The ETA Form 9089, Section C, Question 9 asks whether the "employer [is] a closely held corporation . . . in which the alien has an ownership interest or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien." The petitioner answered "No" to this question. The petitioner should explain the relationship of the beneficiary to any officers or shareholders, if any, on remand as the statement regarding the beneficiary's address raises questions about whether the beneficiary and petitioner's owner are related by "blood" or have pre-existing financial or friendship ties. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Here, the ETA Form 9089 was accepted on May 1, 2007. The proffered wage as stated on the ETA Form 9089 is \$13.01 per hour (\$27,060 per year). The ETA Form 9089 states that the position requires two years of experience in the position offered as a cook.

The AAO conducts appellate review on a *de novo* basis. *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.³

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in 2006 and as an S corporation in 2007. On the petition, the petitioner claimed to have been established in 2005 and to currently employ 18 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the ETA Form 9089, the beneficiary claimed to have worked for the petitioner from April 1, 2005 to May 1, 2007 (the date that the labor certification was filed).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of 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. The petitioner submitted no evidence that it ever employed the beneficiary or paid him any wages.

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 (1st Cir. 2009); *Taco Especial v.*

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Napolitano, 696 F. Supp. 2d. 873, 881 (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 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. See *Taco Especial*, 696 F. Supp. 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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on July 21, 2008 with the receipt by the director of the petitioner's response to the director's request for evidence. As of that date, the 2007 income tax

return was the most recent available⁴ and stated net income of -\$16,816.⁵ The petitioner's negative net income is insufficient to demonstrate the ability 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.⁶ 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 submitted only the first page of its 2007 tax return in response to the director's request for evidence, which did not include Schedule L. The director noted the petitioner's failure to submit its Schedule L in his decision. On appeal, the petitioner submitted its 2007 Schedule L, which showed net current assets of \$58,565.⁷

The net current assets are sufficient to demonstrate the petitioner's ability to pay the proffered wage in 2007. However, on remand, the petitioner should submit a full and complete copy of its 2007 tax return, including all Schedules, to confirm the petitioner's ability to pay the proffered wage for this year. The director may additionally want to request the petitioner's subsequent tax returns including

⁴ The petitioner also submitted its Form 1120 for 2006, but as that return covers a period prior to the priority date, it will be considered only generally.

⁵ 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 18 (2007) of Schedule K. See Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 21, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). The petitioner submitted an incomplete copy of its tax return that did not include a Schedule K, so its net income figure stated above is from line 21. However, in order to properly determine the petitioner's net income, the petitioner would need to submit its full Form 1120S including all Schedules to determine whether the petitioner's net income should more properly be obtained from Schedule K.

⁶ 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.

⁷ The petitioner submitted only the single page of its Form 1120S on appeal containing the Schedule L, but did not submit a full and complete copy of its Form 1120S.

all Schedules as the petitioner must establish its continuing ability to pay the proffered wage from the priority date onward until the beneficiary obtains permanent residence.

While the petitioner can establish its ability to pay based on its 2007 net current assets, the petition is not currently approvable. 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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'r 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). The ETA Form 9089 requires two years of experience as a cook.

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

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. 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.

On the ETA Form 9089, the beneficiary listed his experience as from April 1, 2005 to May 1, 2007 (the date of signing) with the petitioner as a cook; from March 1, 1998 to July 1, 2004 with [REDACTED] as a cook; and from October 1, 1996 to February 28, 1998 with [REDACTED] as a chef. All of these restaurants are located in the Commonwealth of Massachusetts.

In support of the beneficiary's experience, the petitioner submitted a letter from [REDACTED]. The signature on the letter is illegible, and the letter does not identify the position of the signor. The letter states that the beneficiary worked at [REDACTED] Boston, Massachusetts, from March 1998 to July 2004. On the beneficiary's Form G-325, submitted in conjunction with his Form I-485, Application to Register Permanent Residence or Adjust Status filed in 2001 with another application, the beneficiary stated that he was a student in California from March 1997 to the date of signing September 9, 2001, and was residing in Newport Beach, California until the date of signing. The dates of the beneficiary's claimed experience with [REDACTED] in Massachusetts significantly conflict with his claimed residence on Form G-325, which stated that he was a student in California until at least September 2001. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-592. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591. The Director should request evidence to clarify these significant discrepancies and should request W-2 statements or other independent verification in support of any claimed work experience.⁸

In addition to the above listed issues, the labor certification submitted was unsigned. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

(a) Filing applications.

- (1) Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application

⁸ See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

- (d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

Although an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition, it was not signed by the alien, counsel, or the petitioner in accordance with 20 C.F.R. § 656.17.

As the petitioner can establish its ability to pay in 2007, but has not had an opportunity to address the issue related to having a properly signed ETA Form 9089 or the beneficiary's experience, we will remand the petition back to the director to allow the petitioner to address these issues. As the petitioner did not submit a full and complete copy of its tax returns, the director may find it appropriate to request a full and complete copy of the petitioner's 2007 tax returns as well as copies of tax returns for 2008 onward to establish the petitioner's continuing ability to pay. Additionally, the director should require documentation to resolve the substantial conflict in claimed experience as set forth above and obtain the requisite ETA Form 9089 signatures.

In view of the foregoing, the case is remanded to the director for consideration of the issues stated above. If the director requests any additional evidence considered pertinent, the petitioner may be provided a reasonable period of time to be determined by the director to submit a response. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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