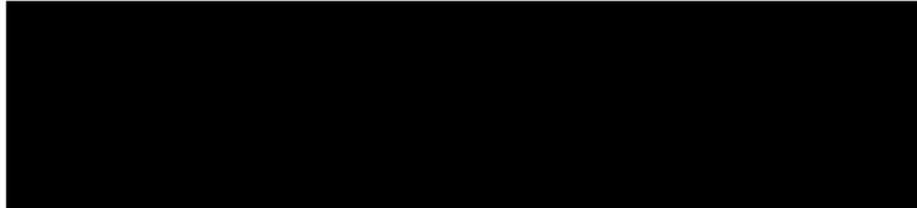


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **AUG 02 2012** 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is [REDACTED] and pastries shop. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. 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 denied the petition, finding that the petitioner had failed to establish the ability to pay the proffered wage from the priority date and that the beneficiary had the necessary qualifications for the position as of the priority date.

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.

The issues in this case are (1) whether the beneficiary has the requisite education and work experience in the job offered as of the priority date, and (2) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

1. The Beneficiary's Qualifications

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. The priority date 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 name of the job title or the position for which the petitioner seeks to hire is "Restaurant Manager." The job description under section 13 of the Form ETA 750A is as follows:

Oversee service in dining room and other areas of the operations. Supervise shift of workers, select menu items, analyze recipes to determine labor, overhead costs

and assign prices to various dishes. Place orders with suppliers and schedule delivery of fresh food and beverages. Organize menu list and schedule for catering parties. Arrange for orders and deliveries of foods for catering. Interview, hire and fire employees, resolve customers' complaints. Tally cash and charge receipts, balance them against record of sales.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of Bachelor of Science in Hotel and Restaurant Management, two years of work experience in the job offered, and the ability to speak, read, and write the Tagalog language. The record shows that the petitioner filed the Form ETA 750 for processing with DOL on October 23, 2002.

To determine whether a beneficiary is eligible for a preference immigrant visa, 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, 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).

On the Form ETA 750, part B, signed by the beneficiary on October 2, 2002, she represented she worked at [REDACTED] from August 1997 to September 1999. The beneficiary claimed that she worked as a manager in both places.

To demonstrate that the beneficiary qualifies for the job offered, the petitioner submitted copies of the following evidence:

- A diploma issued in 1997 by University of Santo Tomas the Catholic University of the Philippines conferring the beneficiary the degree of Bachelor of Science in Hotel and Restaurant Management;
- An official transcript of the beneficiary's education from University of Santo Tomas the Catholic University of the Philippines;
- An educational evaluation dated March 8, 2002 and signed by [REDACTED] of Education International stating that the beneficiary's Bachelor of Science in Hotel and Restaurant Management is equivalent to the U.S. bachelor's degree;
- A letter of employment verification dated December 28, 2000 from [REDACTED], Personnel Manager, stating that the beneficiary has been employed by [REDACTED] Bakeshop since September 15, 1999 as a store manager; and
- A letter of employment verification issued on October 15, 1999 by [REDACTED] Human Resources Manager, stating that the beneficiary worked as a Restaurant Manager

at [REDACTED] performing the following duties: "Oversee day-to-day shift operations which includes customer service and awareness; ensure enough manpower for the shift; hire and train new members and monitor their day to day progress; conduct daily monitoring and weekly reports; place orders with suppliers; schedule delivery of fresh food and beverages; ensure enough stocks; and organize menu list and schedule of parties."

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) (<http://www.aacrao.org>). We consider information from the AACRAO website to be reliable. According to AACRAO EDGE, Bachelor of Science from a university in the Philippines represents attainment of a level of education comparable to a U.S. bachelor's degree.

In addition, the record includes letters of employment from the beneficiary's prior employers certifying that the beneficiary worked as either a shop manager or restaurant manager. The letter of employment from [REDACTED] complies with 8 C.F.R. § 204.5(1)(3)(ii)(A) in that it contains the name, title, and address of the writer, and sufficient description of the beneficiary's experience.

In the decision denying the petition, the director declined to accept the letter of employment from [REDACTED] because the letter, according to the director, did not include the duties of "tallying cash and charging receipts and balancing them against record of sales," as described in part 13 of the Form ETA 750, part A.

On appeal, counsel asserts that the duties of tallying cash and charging receipts and balancing them against the record of sales are intrinsic to the position offered as a restaurant manager, and that they are implicit in the nature of the job. Quoting from the Occupational Outlook Handbook 2004-2005 edition, counsel states that food service managers generally are responsible for all of the administrative and human-resource functions of running the business; and that, according to counsel, includes tallying cash and charging receipts and balancing them against record of sales.

We agree. The job description in the letter of employment does not have to exactly match the labor certification job description. It is reasonable to conclude, based on the evidence submitted, that the beneficiary's duties at [REDACTED] are similar to the duties described in the certified Form ETA 750 and that she obtained two years of experience in the job offered before the priority date.¹ Therefore, we find that the beneficiary has the requisite work experience in the job offered as of the priority date and is qualified to perform the duties of the position as required by the labor certification.

¹ We note that the other requirements for the job offered include the ability to speak, read, and write Tagalog. The director did not question the beneficiary's ability to communicate in the Tagalog language.

2. The Petitioner's Ability to Pay

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.

Consistent with the regulation above, the petitioner must therefore demonstrate the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary receives her lawful permanent residence.

The record shows that the rate of pay or the proffered wage, as listed on the Form ETA 750, is \$18.13 per hour or \$37,710.40 per year. Therefore, the petitioner must demonstrate that it has the ability to pay \$18.13 per hour or \$37,710.40 per year from October 23, 2002 and continuing until the beneficiary receives her lawful permanent residence.

The record contains copies of the petitioner's federal tax returns (Forms 1120S, U.S. Income Tax Return for an S Corporation), for the years 2002 through 2005 and the beneficiary's Wage and Tax Statements (Forms W-2) for the years 2002 through 2007.

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 on November 1, 1996, to currently employ eight workers, and to have gross annual income of \$400,000. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

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.²

² 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the 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 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, the beneficiary received the following compensation from the petitioner from 2002 to 2007:

<i>Tax Year</i>	<i>Actual wage (AW) (Box 1, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2002	\$15,042	\$37,710.40	(\$22,668.40)
2003	\$19,935	\$37,710.40	(\$17,775.40)
2004	\$36,985.20	\$37,710.40	(\$725.20)
2005	\$37,710.40	\$37,710.40	\$0
2006	\$37,710.40	\$37,710.40	\$0
2007	\$37,710.40	\$37,710.40	\$0

Based on the table above, the petitioner has established the ability to pay in 2005, 2006, and 2007 but not in 2002, 2003, and 2004.

In adjudicating the appeal, the AAO noted that the petitioner had filed one employment-based immigrant visa petition on behalf of an alien beneficiary other than the beneficiary in the instant case. Consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but also for the other beneficiary until both beneficiaries receive their lawful permanent residence (LPR).

The AAO found that the priority date for the other case [REDACTED] is January 13, 1998. USCIS records also show that the other beneficiary adjusted his status on April 25, 2006.

The rate of pay or the proffered wage stated on the Form ETA 750 for this beneficiary is \$18.89 per hour or \$39,291.20 per year for the position of baker. On March 13, 2012 the AAO sent the petitioner a Request for Evidence (RFE) advising the petitioner to submit additional evidence, such as copies of the Forms W-2, 1099-MISC, paystubs or other documents issued to the other beneficiary through 2006.

In response to the AAO's RFE, the petitioner submits the following evidence:

- The Form W-2 issued to the other beneficiary for 2006, showing the payment of \$23,400; and
- A letter dated April 30, 2012 from the petitioner's accountant stating that this other beneficiary left the petitioner at the end of July 2006 and that the petitioner did not keep any record older than 2006.

The USCIS record for the second beneficiary shows that the other beneficiary received the following amounts from the petitioner in 2003 and 2004, respectively:

- \$13,500 (\$25,791.20 less than the proffered wage) in 2003 and
- \$17,100 (\$22,191.20 less than the proffered wage) in 2004.

Thus, 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 demonstrate that it can pay the following amounts in 2002, 2003, and 2004:

<i>Tax Year</i>	<i>The remainder of the proffered wage of the Beneficiary (B1)</i>	<i>The remainder of the proffered wage of the Other Beneficiary (B2)</i>	<i>B1 + B2 (Total)</i>
2002	\$22,668.40	\$39,291.20 ³	\$61,959.60
2003	\$17,775.40	\$25,791.20	\$43,566.60
2004	\$725.20	\$22,191.20	\$22,916.40

The petitioner can pay those amounts – \$61,959.60 in 2002; \$43,566.60 in 2003; and \$22,916.40 in 2004 – through either its net income or net current assets.

If the petitioner chooses to use its net income to pay 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

³ The petitioner is required to demonstrate the ability to pay the full proffered wage of \$39,291.03 to the other beneficiary for 2003, since the record contains no evidence, such as Forms W-2 or 1099-MISC, that shows the petitioner's ability to pay in 2003.

(E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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 demonstrate its net income (loss) for the years 2002 and 2003, and 2004, as shown below:

<i>Tax Year</i>	<i>Net Income (Loss)⁴</i>	<i>Total Wages to be Paid</i>
2002	\$41,784.00	
2003	\$42,357.00	
2004	\$43,446.00	\$22,916.40

Therefore, the petitioner has sufficient net income to pay the total wages of the two beneficiaries in 2004 but not in 2002 and 2003.

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.⁵ 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's tax returns demonstrate its end-of-year net current assets for the years 2002 and 2003, as shown below:

<i>Tax Year</i>	<i>Net Current Assets</i>	<i>Total Wages to be Paid</i>
2002	42,633.00	
2003	41,826.00	\$49,666.00

⁴ 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 (2006-2008) of Schedule K. See Instructions for Form 1120S, 2008 at <http://www.irs.gov/pub/irs-prior/i1120s--2008.pdf> (last accessed May 24, 2012) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). The petitioner's net income for 2002-2004 is found on line 21.

⁵ 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.

Therefore, the petitioner did not have sufficient net current assets to pay the total wages of the two beneficiaries in this case. Based on the net income and net current asset analysis, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence, particularly in 2002 and 2003.

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.

Unlike *Sonogawa*, however, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until each beneficiary receives or received his or her permanent residence.

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.