

(b)(6)

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

DATE: JUN 29 2012 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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 a catering business. It seeks to employ the beneficiary permanently in the United States as a chef and head cook. As required by statute, the petition is accompanied by 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 December 29, 2008 denial, 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.

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 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 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on May 2, 2007. The proffered wage as stated on the ETA Form 9089 is \$37,794 per year. The ETA Form 9089 states that the position requires a high school

degree, and 60 months of experience in the job offered. Latin American cooking skills and supervisory skills are also required.

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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1976, to have a gross annual income of \$1,300,000, and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year. The ETA Form 9089 indicates the beneficiary does not work for the petitioner.

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'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 Sonegawa*, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary from the priority date of May 2, 2007.

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. Napolitano*, 696 F. Supp. 2d 873 (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.

¹ 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).

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. [The petitioner's] argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 record before the director closed on December 8, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). The director's RFE instructed the petitioner to submit a copy of its 2007 tax return. The petitioner's RFE response stated that its 2007 return had not yet been filed but would "be filed with the next couple of weeks." However, the petitioner never supplemented the record with its 2007 return, even on appeal. The record contains copies of the petitioner's 2005 and 2006 tax returns. However, since these returns predate the priority date of May 2, 2007, they will not be considered here.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

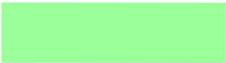
In addition, as is noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The petitioner did not submit tax returns, annual reports or audited financial statements covering the period from the priority date. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation

Therefore, the petitioner has not demonstrated it had sufficient net income or net current assets to pay the proffered wage since the priority date.

On appeal, counsel stated:

USCIS erred by failing to consider alternative methods of determining whether the Petitioner is able to pay the prevailing wage. USCIS failed to consider tip income, assets of the owner of the

²According 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.



business, and depreciation. Additional evidence and a legal brief regarding these issues will be supplied in the near future.

A legal brief and supplemental evidentiary packet will be provided within 30 days.

Counsel dated the appeal January 28, 2009. The regulation requires that any brief shall be submitted directly to the AAO. 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii). On March 5, 2009, counsel requested six weeks of additional time to submit a brief and evidence. The AAO granted the extension and allowed counsel until June 1, 2009 to submit a brief and evidence. As of the date of the instant decision, approximately three years after the June 1, 2009 deadline, the AAO has received nothing further.

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, the beneficiary, and counsel have not signed the certified ETA Form 9089 submitted with the petition. USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. See 20 C.F.R. § 656.17(a)(1).

Further, beyond the decision of the director, the petitioner has also failed to establish that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 labor certification states that the offered position requires a high school degree and 60 months of experience in the job offered of chef with the specific skills of Latin American cooking and supervisory skills. No evidence of the beneficiary's education was submitted. Therefore, the petitioner has not demonstrated the beneficiary possessed the required level of education.

Regarding the required experience in the job offered, on the labor certification the beneficiary claimed to qualify for the position based on the following experience:

Employer Name	Job Title	Start Date	End Date
	chef	10/01/2006	03/15/2007
	chef	10/01/2005	09/30/2006
	executive chef	02/01/2005	09/30/2005

	chef	07/01/2003	07/31/2004
	chef	02/01/1998	09/01/1999
	business apprentice/chef	04/24/1988	04/01/1995

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains letters from the beneficiary's previous employers listed on the ETA Form 9089, with the exception of [REDACTED]

In a letter dated September 12, 2006 (submitted with an English translation), [REDACTED] identifies himself as the legal representative of [REDACTED] in La Ligua, Chile, and states that the beneficiary worked there from "the age of 18 to 25 years, performing different activities, such as administrator, cashier, and other activities." The letter from [REDACTED] lacks specific dates of employment. Further, the letter does not state that the beneficiary worked as a chef. The ETA Form 9089, however, states the beneficiary worked with [REDACTED] Restaurant as a "business apprentice/chef." 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).

A letter in the record dated October 1, 2006, is from [REDACTED]. [REDACTED] does not provide her title, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(A). [REDACTED] states the beneficiary worked as the Head Chef of [REDACTED] from February 1998 to September 1999, and provides a description of his duties including "hiring, training, inventory, daily specials and cost controls. She also states that the beneficiary "introduced a Latino flare to the menu and daily specials."

A second letter dated October 1, 2006 appears in the record. In this letter, [REDACTED] in [REDACTED] describes the beneficiary's duties as the Executive Chef from February 24, 2005 until October 1, 2005. She highlights his "talent for amazing presentation and Latin flair." The dates of employment at [REDACTED] listed on the ETA Form 9089 different from the dates reported in [REDACTED] letter. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, at 591-592.

Finally, there is an undated letter in the record from [REDACTED] in West Chester, PA. [REDACTED] states the beneficiary worked at [REDACTED] "from 2003-2004, and 2005-2006." No specific position held by the beneficiary is identified by [REDACTED] but the beneficiary's duties at [REDACTED] are described as the design and preparation of the daily menu, inventory and general management in the kitchen. The dates of employment at [REDACTED] stated on the ETA Form 9089 are July 1, 2003 to December 31, 2004 and October 1, 2005 to September 30, 2006. However, since the letter from [REDACTED] lacks specific dates for the beneficiary's

³ Based on other evidence in the record, this appears to be the beneficiary's father.

employment, the dates of employment at [REDACTED] claimed by the beneficiary on the ETA Form 9089 are not supported by evidence in the record. *Matter of Ho*, at 591-592.

Thus, because of the inconsistencies and omissions noted above, the record fails to support a finding that the beneficiary possessed the required 60 months of experience as a chef at the time of the priority date.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.