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

(b)(6)

DATE: SEP 10 2012 OFFICE: NEBRASKA 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, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision will be withdrawn in part and affirmed in part.

The petitioner is a restaurant.[1] It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 or that the beneficiary had the requisite experience which would qualify him for the proffered position and 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 May 30, 2009 denial, the first 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 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

[1] The petitioner is actually [redacted] which operates under the fictitious name [redacted] The petitioner used the fictitious name when filing the instant I-140 petition.

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 25, 2005. The proffered wage as stated on the ETA Form 9089 is $12.26 per hour ($25,500.80 per year). The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

It should be noted, at this point, that the petitioner provided another labor certification: ETA Form 750 which was certified for [redacted] in behalf of the beneficiary. The ETA Form 750 was accepted for processing by the DOL on April 27, 2001. In his response to the director's request for evidence (RFE), counsel for the petitioner explained the reason for including this labor certification, indicating that the beneficiary is eligible for "the benefits of the grandfathering provisions of 245(i), even though the second labor certification is not exactly the same as the first labor certification."

Section 245(i) of the Immigration and Nationality Act pertains to the adjustment of status of certain aliens physically present in the United States, provided certain conditions were met by the applicant, including having had a petition for classification under section 204 of the Act (8 USC § 1154) that was filed with the Attorney General on or before April 30, 2001; or an application for a labor certification under section 212(a)(5)(A)...that was filed pursuant to the regulation of the Secretary of Labor on or before such date...

However, this provision permits such aliens to adjust status to that of a lawful permanent resident in the event that such aliens do not satisfy the statutory requirements of either sections 245(a) or 245(k) of the Act. Consideration would be given to the ETA Form 750 only if the applicant for adjustment of status has an approved immigrant visa petition filed in his or her behalf and the other conditions for adjustment have been satisfied. This provision does not pertain to or affect the adjudication of the employment-based immigrant visa petition which would form the basis for the alien's adjustment of status. Nor does it permit the conferring of an earlier priority date upon the beneficiary of an employment-based immigrant visa petition, in the course of adjudicating the petition, if the labor certification was not filed by the employer identified on the labor certification and for the beneficiary identified on the labor certification.

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]

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[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).

On appeal, counsel submits a cover letter; a letter dated June 23, 2009 from [redacted] Certified Public Accountant (CPA); an employment letter dated June 26, 2009 from [redacted]; and a copy of an ETA Form 750 which was certified for [redacted]

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.[3] On the petition, the petitioner claimed to have been established in 2003 and currently to employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on August 9, 2007, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner has sufficient net income to pay the beneficiary the proffered wage in 2005 and 2006, the two years in which the director determined the petitioner unable to pay the proffered wage. On appeal, counsel also asserts that the beneficiary has the requisite two years of experience in the job offered.

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 provided copies of IRS Form W-2 which it issued to the beneficiary in 2006, 2007 and 2008. The beneficiary's W-2,

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[3] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

Wage and Tax Statement, for 2006, 2007 and 2008 shows compensation received from the petitioner, as shown in the table below.

- In 2006, the Form W-2 stated compensation of $12,700.00.
- In 2007, the Form W-2 stated compensation of $28,432.00.
- In 2008, the Form W-2 stated compensation of $33,358.00.

Thus, for 2006, the petitioner paid the beneficiary a portion of the proffered wage but not the full proffered wage. For 2007 and 2008, the petitioner paid the beneficiary at least the full proffered wage. Therefore, for 2006, the petitioner must demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage, that difference being $12,800.80. In addition, the petitioner must demonstrate the ability to pay the full proffered wage for 2005.

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. 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the director closed on April 23, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return is the most recent return available. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2005, the petitioner's Form 1065 stated net income of $56,087.00.[4]
- In 2006, the petitioner's Form 1065 stated net income of $94,574.00.
- In 2007, the petitioner's Form 1065 stated net income of $107,889.00.

Therefore, for the years 2005 and 2006, the petitioner demonstrated sufficient net income to pay the beneficiary the full proffered wage. Though the petitioner already demonstrated that it paid the beneficiary the full proffered wage for 2007, the petitioner also demonstrated sufficient net income to pay the full proffered wage for that year.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL until at least 2008, the petitioner had established that it had the continuing ability to pay the beneficiary the proffered

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[4] For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) and page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (accessed August 14, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule K for 2005, 2006 and 2007 has relevant entries for additional income, deductions and other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

wage as of the priority date through an examination of wages paid to the beneficiary and its net income. Therefore, this basis of the director's decision is withdrawn.

As set forth in the director's May 30, 2009 denial, the second issue in this case is whether or not the beneficiary has the 24 months of qualifying experience which are required by ETA Form 9089 as of the May 25, 2005 priority date.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: High School.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Two years of experience as a seafood chef.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a specialty cook with in , CT from July 1, 1998 until April 10, 2002. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

The record contains an experience letter from , Owner of stating that the company employed the beneficiary from June 1998 through May 2002.

The letter was not written on company letterhead and, therefore, does not appear to be official business correspondence. This fact detracts from the veracity of the attestation. In his letter, Mr. states that the beneficiary began working for as "a full time cook prep." In this capacity, the beneficiary:

> Washed and sliced food items for the kitchen, such as seafood and for the front counter such as cheese, lettuce, tomatoes and cold cuts. To perform his duties he used knives, slicing and grinding machines and a dough machine.

Mr. goes on to explain that, "from May 2002 through June 2003, [the beneficiary] was promoted as a specialty cook." Mr. describes the duties which the beneficiary performed, stating:

> [the beneficiary] prepared Italian and Seafood fare. His responsibilities were as follows: he prepared meals by measuring, mixing and cooking ingredients. His work included preparing individual meals to order. The equipment that he used included a boiler, grill, fryer, slicer and oven and a variety of pots, pans, cutlery and other cutting, chopping, and thawing, some food items that he later uses in the meal preparations. In addition, he performed some preparatory work.

According to this letter, the beneficiary worked, as a preparer from June 1998 until May 2002. From May 2002 until June 2003, according to this letter, the beneficiary worked as a specialty cook. However, Section H of ETA Form 9089 requires the prospective specialty cook to have 24 months of experience as a chef or seafood chef, preparing food for cooking and sautéing and cooking dishes according to recipes. The letter provided as evidence does not attest to 24 months of such experience. Further, the dates of claimed employment do not correspond with the dates identified on ETA Form 9089. On this document, which was signed by the beneficiary under the penalty of

perjury and which was certified by the DOL, the beneficiary claimed to have worked for from July 1, 1998 until April 10, 2002.

The petitioner also provided a letter dated April 21, 2009 from an individual who signed his name and below it printed ' The letter is not written on company letterhead, does not bear a business address and does not appear to contain a business phone number. These deficiencies detract from the credibility of the attestation. The author states that the beneficiary worked at as a Seafood Chef from May of 2002 through June of 2003." According to the author, the beneficiary "prepared seafood meals according to individual orders" and "prepared some preparatory work, including the preparation of recipes and selection of the seafood." The author does not indicate whether the beneficiary worked on a full-time or part-time basis.

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).

According to the letter from the the beneficiary worked on a full-time basis for that employer, from July 1998 until June 2003. The petitioner has not explained and provided no evidence demonstrating how the beneficiary could have worked full-time for the and also worked for at the same time.

Further, apart from the discrepancies in the actual letter, this second employment experience is not identified on ETA Form 9089.

In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The beneficiary provided no objective, verifiable evidence demonstrating that he was employed by . Therefore, this evidence cannot be accepted.

On appeal, counsel asserts that he is submitting an amended letter from which demonstrates that the beneficiary has the requisite experience. In support of his assertion, counsel submits a letter dated June 26, 2009 from which now states that the beneficiary was employed by from July 1998 through 2002. However, in the second letter Mr. states that the beneficiary worked "as cook prep from July 1998 through March 2000." Mr. further states that the beneficiary was promoted to specialty cook in March 2000 and worked in that capacity through May 2002. Mr. says nothing regarding the beneficiary's employment from May 2002 through June 2003 as attested in the first letter.

The dates of claimed employment on the amended letter still do not correspond with the dates which the beneficiary identified on ETA Form 9089 in which the beneficiary claimed to have worked for from July 1, 1998 until April 10, 2002. Further, though Mr. changed his statements regarding the dates upon which he earlier claimed to have employed the beneficiary and the capacity in which he claimed to have employed him, he provided no explanation for the alteration and no explanation for the omission of one year worth of employment (May 2002 through June 2003).

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Mr. had already attested that the beneficiary worked as a cook preparer from June 1998 until May 2002 and that he was promoted to specialty cook in May 2002, a position the beneficiary held until June 2003. The petitioner may not now, on appeal, provide a letter from the same individual with a different set of facts or statements solely for the purpose of perfecting a deficient petition. Further, the petitioner provided no objective, verifiable evidence which would demonstrate which set of statements is true. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.