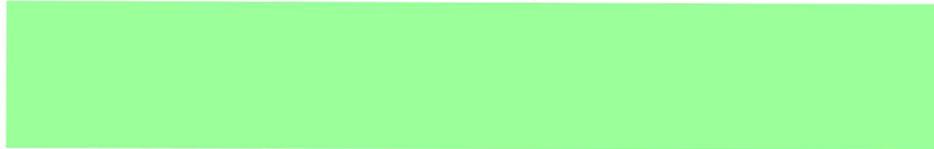


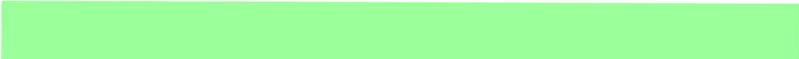


U.S. Citizenship
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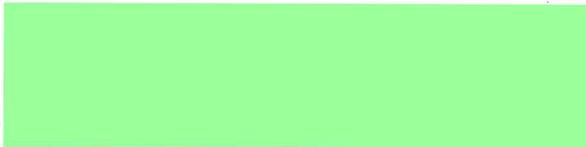
Date: **JAN 24 2013** Office: TEXAS SERVICE CENTER FILE: 

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Texas Service Center (the director), on July 25, 2007, but the director later revoked the approval of the petition on June 6, 2012. The decision to revoke the approval of the petition is now before the Administrative Appeals Office (AAO) on certification pursuant to 8 C.F.R. § 103.4(a). The AAO will affirm the director's decision.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as an accountant pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As indicated above, the petition was initially approved, but the approval of the petition was later revoked. The director in the Notice of Certification dated June 6, 2012 (NOC) concluded that the petitioner failed to establish that (a) the beneficiary is eligible to be classified as a skilled worker, and that (b) the petitioner has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

As set forth in the director's NOC, the issues in this case are (a) whether or not the beneficiary possessed the requisite work experience in the job offered before the priority date, and (b) 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.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

a) The Beneficiary's Qualifications for the Job Offered.

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 U.S. Department of Labor (DOL). See 8 C.F.R. § 204.5(d).

Here, the priority date – which is the date the Form ETA 750 was accepted for processing by DOL – is April 20, 2004. To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must therefore, among other things, ascertain whether the beneficiary is, in fact, qualified for the certified job as of April 20, 2004.

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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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).

In this case, the name of the job title or the position for which the petitioner seeks to hire is "Restaurant Accountant." The job description under item 13 of the Form ETA 750, part A, is as follows:

Prepare monthly and annual financial reports, monitor cash flow and implant internal controls to control cash transactions. Prepare state, federal, and city tax returns. Compile and post journal entries to the ledger, compute sales and meal taxes. Prepare monthly and annual budgets and sales forecasts. Audit and prepare payroll entries and reports.

Under item 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of a bachelor's degree in accounting plus two years of work experience in the job offered or in the related occupation of restaurant management.

On the Form ETA 750, part B signed by the beneficiary on April 13, 2004, he represented that he worked 40 hours a week as an accountant at [REDACTED] from April 1999 to October 2003 and for the petitioner from January 2004 to present. The beneficiary also claimed to have a bachelor's degree in accounting from [REDACTED]

To show that the beneficiary has the requisite educational and work experience requirements, the petitioner submitted the following evidence:

- A copy of the beneficiary's certificate of graduation from [REDACTED] and transcripts showing that the beneficiary graduated with a bachelor's degree in accounting in 1998;
- A copy of an educational evaluation report dated July 25, 2002 from Foreign International Services, Inc. and signed by [REDACTED] stating that the beneficiary's bachelor degree in accounting is comparable to a bachelor's degree in accounting from an accredited college or university in the United States;
- A letter of employment certification from [REDACTED] certifying that the beneficiary worked as an accountant from April 21, 1999 to October 31, 2003; and
- A letter of employment certification dated January 29, 2012 from [REDACTED] General Manager, stating that the beneficiary worked at [REDACTED] as an accountant from April 21, 1999 to October 31, 2003 and that his duties included: preparing and analyzing financial statements; maintaining ledgers of assets and liabilities; monitoring expenses and budget reports; making monthly journal entries for payroll and taxes; generating cash reports on a monthly basis; and preparing monthly and annual budgets.

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In the NOC, the director simply stated that the beneficiary is not eligible to be classified as a skilled worker.

We disagree with the director's conclusion. The record contains sufficient evidence to demonstrate by a preponderance of the evidence that the beneficiary possesses the equivalent of a bachelor's degree in accounting and that he has the requisite work experience as of the priority date. 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's degrees awarded by universities in Jordan upon completion of four years in most programs represent attainment of a level of education comparable to a U.S. bachelor's degree. Here, the beneficiary's school transcripts show that the beneficiary attended a four-year school program (from 1994 to 1998), and was awarded the bachelor's degree upon his completion in the program in 1998.

In addition, the letter of employment from [REDACTED] complies with 8 C.F.R. § 204.5(l)(3)(ii)(A) in that it contains the name, title, and address of the writer, and sufficient description of the beneficiary's experience. For these reasons, the director's decision that the beneficiary is not eligible to be classified as a skilled worker will be withdrawn.

Nevertheless, the petition cannot be approved as the petitioner failed to establish by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

b) The Petitioner's Ability to Pay

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).

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

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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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary receives his lawful permanent residence. The record shows that the priority date, as noted above, is April 20, 2004, and that the rate of pay or the proffered wage, as listed on the Form ETA 750, is \$36,150 per year. Therefore, the petitioner must demonstrate that it has the ability to pay \$36,150 per year from April 20, 2004 and continuing until the beneficiary receives his lawful permanent residence.

To show that the petitioner has the ability to pay, the petitioner submitted the following evidence:

- Copies of the petitioner's federal tax returns filed on the Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2004 through 2010; and
- Copies of the beneficiary's Wage and Tax Statements (IRS Forms W-2) for the years 2004 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 July 1, 1999, to currently employ five workers, and to have gross annual income and net annual income of \$459,000 and \$65,948, respectively.

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 2004 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>
2004	\$27,262	\$36,150	(\$8,888)
2005	\$29,164	\$36,150	(\$6,986)
2006	\$31,428	\$36,150	(\$4,722)
2007	\$28,800	\$36,150	(\$7,350)

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Based on the table above, the petitioner has not established the ability to pay in any of the qualifying years from the priority date.

Where the petitioner does not establish that it employed and/or paid the beneficiary an amount at least equal to the proffered wage during the qualifying period such as in this case, 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 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.

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River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities. 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.

Based on the evidence submitted above, the petitioner’s net income and net current assets for the years 2004-2010 are shown below:

<i>Tax Year</i>	<i>Net Income (Loss)²</i>	<i>Net Current Assets³</i>
2004	\$42,235	\$13,927
2005	\$65,948	\$26,415
2006	\$79,488	\$21,950
2007	\$79,937	\$25,894
2008	\$36,153	\$32,219
2009	\$29,264	\$32,283
2010	\$36,849	\$29,857

² For an S Corporation, 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 if the S corporation’s income is exclusively from a trade or business. 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) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, 2011, at <http://www.irs.gov/pub/irs-prior/i1120s--2011.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the net income for the years 2004 to 2007 is found on line 21 of page one of the Form 1120S. The 2008 net income is found on line 18 of the schedule K.

³ 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.

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The net income from 2004 to 2008 and in 2010 each exceeds the remainder of the proffered wage for the respective years,⁴ and therefore, the petitioner has established the ability to pay in those years, but not in 2009.

The director indicated in the Notice of Intent to Revoke dated January 9, 2012 (NOIR) that the petitioner had previously filed one other immigrant petition (Form I-140) for an alien beneficiary other than the beneficiary in the instant case.⁵ Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, not only required to establish the ability to pay the proffered wage of the current beneficiary but also of the other beneficiary listed by the director in the NOIR from the date of filing each respective labor certification application until the date each beneficiary including the beneficiary in this instance obtains lawful permanent residence, or until the petition is either withdrawn, denied, or revoked.⁶

The director specifically advised the petitioner in the NOIR to submit additional evidence to demonstrate that the petitioner has the ability to pay the proffered wages of both beneficiaries. On appeal to the AAO, counsel for the petitioner states that the petitioner is not required to submit proof of the ability to pay the proffered wage for both beneficiaries as the petitioner has withdrawn the petition for the other beneficiary.

We disagree with counsel's argument. The petitioner requested to withdraw the other petition only after the director issued the NOIR in 2012. Thus, the petitioner is required to establish the ability to pay the proffered wages of both beneficiaries in 2009, 2010, and 2011. The petitioner only submitted proof of payment for the other beneficiary for the year 2011. The record contains no other evidence of the ability to pay. Due to the lack of evidence, the AAO cannot conclude that the petitioner has established the ability to pay in 2009, 2010, and 2011.

Finally, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The

⁴ The remainder of the proffered wage from 2004 to 2008, as noted above, is as follows: \$8,888 in 2004; \$6,986 in 2005; \$4,722 in 2006; \$7,350 in 2007; and \$36,150 in 2008, 2009, and 2010.

⁵ The priority date for the other petition is December 23, 2009. Further details of that petition will not be repeated here.

⁶ In response to the director's NOIR, the petitioner submitted a letter dated February 9, 2012 requesting to withdraw the petition filed behalf on the other beneficiary.

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petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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

In summary, the director's finding that the beneficiary is not eligible to be classified as a skilled worker is withdrawn. Nevertheless, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition. Section 205 of the Act, 8 U.S.C. § 1155, states, "The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke the approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. 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. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

As stated above, we agree with the director that the petitioner has failed to establish by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. The revocation of the previously approved petition is affirmed for this reason. 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.

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ORDER:

The director's decision to revoke the previously approved petition is affirmed.