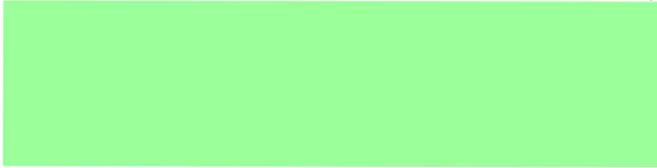




U.S. Citizenship
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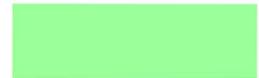
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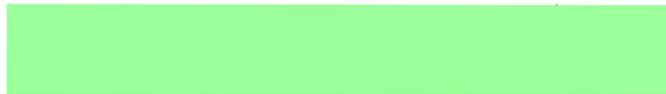
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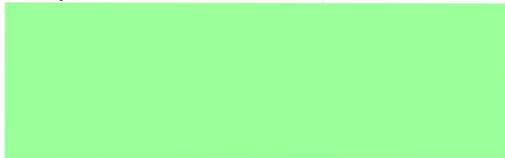
Petitioner:



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 denied by the Director, Texas Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a sous head chef¹ as a skilled worker or professional pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to demonstrate that the beneficiary satisfied the experience requirements as stated on the labor certification and that the petitioner failed to meet the documentary requirements stipulated in C.F.R. § 204.5(g)(2) in order to show that it had the ability to pay the beneficiary the proffered wage from the priority date onwards. 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 October 30, 2009 denial, one 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 Alien 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

¹ Form ETA 9089 lists the position offered as sous chef.

had the qualifications stated on its ETA Form 9089, Application for Alien 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 August 1, 2005. The proffered wage as stated on the ETA Form 9089 is \$19,760 per year². The ETA Form 9089 states that the position requires 24 months of experience as a sous chef or cook.

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.³

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the ETA Form 9089, the petitioner claimed to have been established in 2004 and to currently employ five 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 24, 2005, the beneficiary does not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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 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. In the instant case, the petitioner has submitted the financial information for 2005 to 2008, but has only submitted Internal Revenue Service (IRS) Forms W-2 showing wages paid to the beneficiary for 2005 to 2007. The IRS Forms W-2 show the following wages paid to the beneficiary:

² Form I-140 states the proffered wage is \$332.50 per week or \$17,290 per year.

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

<u>Year</u>	<u>Wages Paid</u>	<u>Difference between proffered wage and wages paid</u>
2005	\$19,494	\$276
2006	\$20,247	paid above the proffered wage
2007	\$19,389	\$371
2008	No IRS Form W-2 Submitted	

Therefore, the petitioner established the ability to pay for 2006 because it paid the beneficiary in excess of the proffered wage.

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 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 record before the director closed on September 30, 2009 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny (NOID). As of that date, the petitioner had submitted its 2008 annual tax returns. On appeal, the petitioner submitted its tax returns for 2005 to 2007. The petitioner's tax returns demonstrate its net income, as shown in the table below.

<u>Year</u>	<u>Form 1120S stated net income</u> ⁴	<u>Difference between proffered wage and wages paid</u>
2005	\$139	\$276
2007	\$4,484	\$371
2008	\$33,675	\$19,760

Therefore, for the years 2007 and 2008, the petitioner had sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown

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) or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 3, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income/credits/deductions/other adjustments shown on its Schedule K for 2005 to 2008, the petitioner's net income is found on Schedule K of its tax return.

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

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 2005, as shown in the table below.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ The petitioner's IRS Form 1120S show the following net current assets for 2005:

<u>Year</u>	<u>Form 1120S stated net current assets</u>	<u>Difference between proffered wage and wages paid</u>
2005	\$26,857	\$276

Therefore, for the year 2005, the petitioner had sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The director additionally determined that the petitioner failed to demonstrate that the beneficiary satisfied the experience requirements as stated on the labor certification. 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)(1), (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.

salaries). *Id.* at 118.

⁶According 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.

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: None.
- 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: Not Accepted.
- H.10. Experience in an alternate occupation: 24 months as a cook.
- H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a head chef with [REDACTED] in Rhode Island from July 1, 2002 to July 15, 2004 and as a cook with [REDACTED] in Massachusetts from September 1, 1999 to August 30, 2001. 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 dated September 24, 2009 from [REDACTED] Owner of [REDACTED] stating that the beneficiary worked for him at [REDACTED] as a cook from August 1, 2002 to July 1, 2004. However, the letter does not discuss the beneficiary’s duties or the restaurant’s location and the dates of employment do not match those reported on the ETA Form 9089. Furthermore, the letter states that [REDACTED] owned [REDACTED] as is reflected on the ETA Form 9089. Per *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), “[i]t is incumbent upon the petitioner to

resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.”

The record also contains an experience letter dated May 19, 2003 from [REDACTED] Owner, on [REDACTED] letterhead stating that the company employed the beneficiary as a cook from September 1999 to August 2001.

In response to the director’s NOID issued August 27, 2009, the petitioner also submitted two e-mails dated September 12, 2009 and September 25, 2009 from [REDACTED] who is now living in Brazil, reconfirming that the beneficiary was employed by him and stating that [REDACTED] closed in 2001. The NOID response also contained a signed statement from the beneficiary stating that she worked for [REDACTED] from September 1999 until August 2001 and that she worked for [REDACTED] from August 1, 2002 to July 1, 2004.

The director noted a number of inconsistencies with the beneficiary’s claimed employment experience in the denial; namely, that the start and end dates listed on the employment letter and those reported on the ETA Form 9089 for [REDACTED] do not match. The director also noted that the employment letter from [REDACTED] was written in 2003 on [REDACTED] letterhead, but that [REDACTED] had supposedly gone out of business in 2001. Furthermore, the director noted that the beneficiary’s 2003 Form 1040 individual tax returns do not reflect employment with [REDACTED] but instead state that during 2003 the beneficiary was self-employed as a cook out of her home in [REDACTED], Massachusetts.

On appeal, counsel for the petitioner provided a notarized affidavit from [REDACTED] dated December 27, 2009. Counsel states that [REDACTED] used the letterhead of the no longer operational business because he still had the letterhead and thought it was the proper thing to do. Counsel further submitted a statement from [REDACTED] dated December 28, 2009, in which he states that the dates of employment he listed in the prior experience letter were incorrect, and that he now recalls that the beneficiary worked for him from July 1, 2002 until July 15, 2004. Counsel also asserts that the beneficiary reported self-employment during 2003 by mistake on her tax return and that she was indeed working for [REDACTED] in 2003. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

We are not persuaded by counsel’s assertions that the beneficiary has the required 24 month of experience as a sous chef or cook. The record does not contain independent objective evidence that [REDACTED] was in existence from September 1999 to August 2001 or that the beneficiary worked there as a cook during that time. As the beneficiary would have been 16 at the time of claimed employment with [REDACTED] we find it doubtful that she held the position of cook, as alleged. Furthermore, the original experience letter was written on the business letterhead more than two years after the business ceased to exist, raising questions about the actual business history of [REDACTED]. Doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the

reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 582, 591.

As noted above, the dates the beneficiary claims to have worked at [REDACTED] as well as well are different from those reported on the ETA Form 9089. We are not persuaded by the counsel's explanation of the inconsistency. While the petitioner submitted a statement from [REDACTED] stating that he was mistaken about the dates, the petitioner does not explain why the beneficiary's signed statement also says she worked at [REDACTED] from August 1, 2002 to July 1, 2004. The beneficiary's statement contradicts the information on the ETA Form 9089 and the dates of employment reported by [REDACTED]. The petitioner also submitted an IRS Form W-2 for the beneficiary for 2004 from [REDACTED] as evidence of her prior employment. However, the IRS Form W-2 appears to have been altered. Furthermore, the ETA Form 9089 states that [REDACTED] is located in Rhode Island, which is inconsistent with the address reported on the IRS Form W-2. Counsel states that [REDACTED] used his home address for the business to file certain tax documents; however, the petitioner has not provided a satisfactory explanation for why the beneficiary would have listed the owner's home address rather than the actual physical location where she worked on the forms in question. Additionally, the beneficiary's 2003 IRS Form 1040 states that she was self-employed as a cook during that year, which contradicts her claims of employment with [REDACTED]. We are not persuaded by counsel's statement that the beneficiary simply made a mistake on her tax filing; instead we find that this contradiction raises doubt regarding her alleged prior employment. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Therefore, 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.