

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. Additionally, the motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

The petitioner is an ethnic food and specialty store. It seeks to employ the beneficiary permanently in the United States as a specialty chef. 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 and that the beneficiary was qualified for the position. The director denied the petition accordingly.

As set forth in the director's denial, the primary issues in this case are whether the petitioner established the beneficiary's three years of prior work experience as a specialty chef as required in the approved labor certification, and whether the petitioner has the ability to pay the proffered wage as of the 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)(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 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).

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: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 36 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: Knowledge of ethnic cuisine.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as an Embassy Chef with the [REDACTED] in Washington D.C. from August 22, 2001 until July 31, 2004.¹ No other experience is listed.² 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.

In connection with a previous application for the same beneficiary, the petitioner submitted letters of experience for the beneficiary, including: an experience letter from [REDACTED] Ambassador Extraordinary and Plenipotentiary of [REDACTED] to the United States of America on his letterhead, dated April 7, 2001, stating that the embassy employed the beneficiary as a chef from November 1996 until September 1999;³ experience letter from [REDACTED] Deputy Chief of Mission to the Embassy of the [REDACTED] from 2000 to 2004, not on Embassy letterhead, dated June 15, 2004, stating that the beneficiary was employed from August 2000

¹ We note that the experience listed on the ETA Form 9089 does not equal 36 months. The experience claim on the Form 9089 only accounts for 34 months of experience.

² The labor certification requests the beneficiary to list all former work experience that would qualify the beneficiary for the position.

³ On the Form 9089 the beneficiary did not list his employment with the [REDACTED] Embassy from November 1996 until September 1999. 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.

through the date of the letter as a chef; experience letter from [REDACTED] Ambassador Extraordinary and Plenipotentiary of [REDACTED] to the United States of America on embassy letterhead, stating he has known the beneficiary as a chef from August 2001 until October 2003.⁴ The record contains a second experience letter from Mr. [REDACTED] dated December 10, 2006 stating that the beneficiary was employed as the Ambassador's Chef; however, the experience letter does not contain the beneficiary's dates of employment; experience letter from [REDACTED] Ambassador, on Embassy of [REDACTED] letterhead, dated June 15, 2004, claiming that the beneficiary was employed as a cook from October 2001 until June 2004 at the Embassy of the Republic of [REDACTED] in Washington D.C.

On October 12, 2004, the beneficiary executed a Form G-325 Biographic Information in connection with an application to adjust status to lawful permanent residence, in which he indicated that he worked for [REDACTED] in [REDACTED] from 1996 through August 2001. The Form G-325 signed by the beneficiary, under penalty of perjury, is in direct conflict with the experience letters above, which claims that the beneficiary worked for the [REDACTED] Embassy in Washington D.C. from 1996 to 1999 and 2000 until 2004.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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... Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

On June 9, 2006, the beneficiary executed another Form G-325 in connection with a second application to adjust status, in which he indicated that he worked as a chef in [REDACTED] from 1978 through August 2001.

On appeal of the director's decision in the instant case denying the petition, the petitioner provided a letter dated February 18, 2009 from Mr. [REDACTED] who notes that the discrepancy between October 2003 and July of 2004 for the beneficiary's end dates of employment was due to the transition from one ambassador to another.⁵ We find that this is a reasonable explanation and find that more likely than not that the beneficiary was employed as a Chef from August 22, 2001 until July 1, 2004. As noted previously, this experience does not equal three years of relevant work experience.

⁴ This undated experience letter only provides about 26 months of possible experience as a specialty chef with the Embassy of [REDACTED]

⁵ Mr. [REDACTED] letter does not address the inconsistency in the evidence between the letter from [REDACTED] which stated that the beneficiary worked in Washington DC from 1996 until 1999, and the beneficiary's statements that he worked in [REDACTED] until 2001.

Also on appeal, the petitioner submitted the foreign translation of the beneficiary's soviet employment book⁶ which provides that the beneficiary was employed with the restaurant, [REDACTED] from March 16, 1982 until October 3, 1991 and again from August 17, 1994 until November 8, 1996 as a 4th class cook. This evidence conflicts with the beneficiary's statement on the Form G-325 dated October 12, 2004 that he was employed by [REDACTED] from 1996 until 1999 and with the Form G-325 dated June 9, 2006 that he was employed as a chef in [REDACTED] from 1978-2001. While the evidence is objective and independent, and thus could be accepted to corroborate the beneficiary's employment with [REDACTED] from 1982 until 1991 and from 1992 until 1994, there is no evidence from [REDACTED] establishing the employment as required by the regulation at 8 C.F.R. § 204.5 (1)(3)(ii)(A). The petitioner has not established that secondary evidence should be accepted to establish the beneficiary's employment with [REDACTED] and has not submitted secondary evidence in a format required by 8 C.F.R. § 103.2(b)(1). The record does not establish that the beneficiary's employment with [REDACTED] was as a specialty chef. The record does not establish that the beneficiary has three years of employment as a specialty chef. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A) of the Act.⁷

The AAO and the director both found that the petitioner had not established the ability to pay the proffered wage.

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

⁶ The employment record book is an official personal document recording the employment status of its owner over time. (http://en.wikipedia.org/wiki/Employment_Record_Book#Soviet_Union.2C_Russian_Federation, Accessed December 12, 2013)

⁷ 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 AAO and the director both found that the petitioner had not established the ability to pay the proffered wage.

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 June 22, 2006. The proffered wage as stated on the ETA Form 9089 is \$11.60 per hour (\$24,128 per year).

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 in 1996 and to currently employ 40 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

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 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 demonstrated that it paid the beneficiary \$23,137.88 in 2006, which is less than the proffered wage. However, the record does establish that the beneficiary was paid more than the proffered wage in 2007 and 2008. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2006, a difference of \$990.12.⁸

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

⁸ As indicated in the previous decision of the AAO, the petitioner submitted payroll information indicating that it paid the beneficiary \$1,001.40 in 2009, a deficiency of \$23,126.60.

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, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

The record before the AAO closed on December 2, 2013 with the receipt by the AAO of the petitioner's submissions in response to the AAO's notice of intent to dismiss (NOID) dated October 31, 2013. As of that date, the petitioner's 2013 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2012 is the most recent return available.⁹ The tax

⁹ In the NOID we noted a discrepancy between the petitioner's name and employer identification number and the applicant for the ETA 9089. The petitioner through counsel claims that the discrepancy was due to a typographical error. The AAO accepts the evidence that the second FEIN

returns in the record relate to the petitioner and demonstrate the petitioner's net income for 2006, 2009, 2010, 2011, and 2012 as shown in the table below.

- In 2006, the Form 1120S stated net income¹⁰ of \$2,286.
- In 2009, the Form 1120S stated net income of -\$34,542.
- In 2010, the Form 1120S stated net income of -\$55,162.
- In 2011, the Form 1120S stated net income of -\$49,379.
- For 2012, the Form 1120S stated net income of -\$34,111.

On October 31, 2013, the AAO notified the petitioner and counsel that we had identified 3 additional beneficiaries sponsored by the petitioner. The petitioner through counsel responded on December 2, 2013 and claimed that two of the beneficiaries no longer worked for the petitioner. The petitioner provided no evidence that the petitions for those additional beneficiaries were ever withdrawn. Thus, the petitioner has failed to establish that it had sufficient net income to establish its ability to pay the beneficiary and three additional beneficiaries the proffered wage for 2006, 2009, 2010, 2011, and 2012.¹¹ See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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.¹² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006, 2009, 2010, 2011, and 2012 as shown in the table below.

- In 2006, the Form 1120S stated net current assets of \$414,249.

was a mistake.

¹⁰ 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.

¹¹ The petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The failure of the petitioner to provide this evidence cannot be excused.

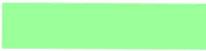
¹² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2009, the Form 1120S stated net current assets of \$139,933.
- In 2010, the Form 1120S stated net current assets of \$79,849.
- In 2011, the Form 1120S stated net current assets of \$42,722.
- For 2012, the Form 1120S stated net current assets of -\$10,704.

For the years 2006, 2009, 2010, 2011, and 2012, the petitioner's failure to provide evidence for all of its beneficiaries has prevented the AAO from determining the petitioner's ability to pay the proffered wage for four workers out of its net current assets. We find it more likely than not that the petitioner has not demonstrated its ability to pay the proffered wage through either its net income or net current assets for the years 2006 and 2009 through 2012. Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiaries the proffered wage as of the priority date through an examination of wages paid to the beneficiaries, or its net income or net current assets.

Counsel asserts on appeal that that petitioner's overall business activities and the petitioner's continued business activities for the last seven years establishes its ability to pay the proffered wage. Additionally, counsel states that the petitioner does not need to account for the additional beneficiaries because they no longer work for the petitioner and that the delay in USCIS processing has created an undue necessity on the petitioner to establish the petitioner's ability to pay the proffered wage. The record does not contain any correspondence from the petitioner to USCIS withdrawing any of the petitions. Counsel's argument do not take into account that the regulation requires the petitioner to be able to show the ability to pay the proffered wage to the beneficiaries of all its immigrant visa petitions from the respective priority dates until each obtains legal permanent residence. Counsel states that the petitioner owns and operates five ethnic stores. However, the record does not contain any evidence that the petitioner is the owner of any additional stores, such as federal income tax returns.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic



business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner appears to have been in business since 1996 and employs 40 workers. The petitioner's tax returns show its gross receipts and wages paid to its workers have lowered over time. Over the last three years the petitioner has reported negative net income. Further, its net current assets have also reduced over time. The record is silent concerning the petitioner's reputation within its industry, the occurrence of any uncharacteristic business expenditures or losses, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains denied.