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U.S. Citizenship  
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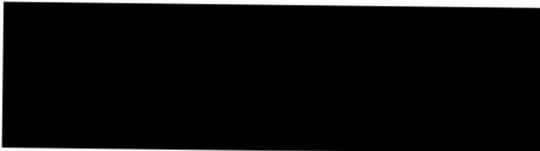
Date:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a telecommunications company. It seeks to employ the beneficiary permanently in the United States as a field engineer (electrical engineer). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 6, 2006 denial, the primary issues in this case are 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 and whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 Form ETA 750, 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 had the qualifications stated on its Form ETA 750, 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 4, 1999. The proffered wage as stated on the Form ETA 750 is \$49,337.60 per year. The Form ETA 750 states that the position requires four years of college education, a bachelor's degree in any field and two years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal, counsel submits a list of the petitioner's accounts receivable dated December 22, 2006.<sup>2</sup> Other relevant evidence in the record includes the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2002, 2003, 2004 and 2005; IRS Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for 2003, 2004 and 2005; information regarding the petitioner's line of credit at Frost Bank,<sup>3</sup> and financial

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<sup>1</sup> 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).

<sup>2</sup> The record before the director closed on November 29, 2006, with receipt by the director of the petitioner's response to the director's request for evidence (RFE). As of that date, the petitioner's 2005 tax return is the most recent return available. The petitioner's accounts receivable are included in the computation of its net current assets on Schedule L of its relevant IRS Forms 1120S, as detailed herein.

<sup>3</sup> In calculating the ability to pay the proffered salary, Citizenship and Immigration Services (CIS) will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit were available at the time of filing the petition. In fact, the promissory note evidencing the line of credit indicates the loan was originated on July 23, 2004, several years after the priority date. A letter from Frost bank dated May 9, 2006, further indicates that the petitioner's line of credit has been cancelled. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

statements for the petitioner for 2002, 2003, 2004 and 2005.<sup>4</sup> The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 1984, to currently employ 41 workers and to have a gross annual income of \$2,240,100.00. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 27, 1999, the beneficiary claimed to have worked for Telecommunication Installations Corp. (TIC) as a field engineer from October 1998 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the petitioner has investors/shareholders who have assets and fund availability to support the operation expenses of the business. Counsel states that the petitioner is continuously growing and submits the petitioner's accounts receivable list as evidence of its recent receipts. Counsel asserts that the petitioner's net income should not be the only consideration in determining the petitioner's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 beneficiary's IRS Forms W-2 for 2003, 2004 and 2005 show compensation received from the petitioner, as shown in the table below.

- In 2003, the Form W-2 stated compensation of \$6,221.75.
- In 2004, the Form W-2 stated compensation of \$10,048.00.
- In 2005, the Form W-2 stated compensation of \$24,680.00.

Therefore, for the years 1999 through 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2003, 2004 and 2005.

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<sup>4</sup> Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Since the proffered wage is \$49,337.60 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$43,115.85, \$39,289.60 and \$24,657.60 in 2003, 2004 and 2005, respectively.<sup>5</sup>

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 CIS, 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 CIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner's tax returns demonstrate its net income for 2002, 2003, 2004 and 2005, as shown in the table below.

- In 2002, the Form 1120S stated net income<sup>6</sup> of \$292.00.
- In 2003, the Form 1120S stated net income<sup>7</sup> of -\$514,641.00.

<sup>5</sup> As set forth herein, the petitioner has not established that it is the successor-in-interest to the applicant listed on the Form ETA 750. Therefore, this office will not accept tax documents or other financial documentation submitted by the petitioner for Telecommunications Installations Corporation as evidence of the petitioner's ability to pay the proffered wage.

<sup>6</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>7</sup> Where an S corporation's income is exclusively from a trade or business, CIS 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 23 (2003) and line 17e (2004-2005) of Schedule K. See

- In 2004, the Form 1120S stated net income of -\$211,214.00.
- In 2005, the Form 1120S stated net income of -\$392,122.00.

Therefore, for the years 1999 through 2005, the petitioner did not have sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> 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 2003, 2004 and 2005, as shown in the table below.<sup>9</sup>

- In 2003, the Form 1120S stated net current assets of \$72,157.00.
- In 2004, the Form 1120S stated net current assets of -\$84,701.00.
- In 2005, the Form 1120S stated net current assets of -\$461,433.00.

Therefore, for the year 2003, the petitioner had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage. For the years 1999, 2000, 2001, 2002, 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not 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 except for 2003.

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Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2003, 2004 and 2005, the petitioner's net income is found on Schedule K of its tax returns.

<sup>8</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>9</sup>In 2002, the petitioner was not required to list its net current assets on Schedule L of its Form 1120S.

On appeal, counsel asserts that the petitioner's net income should not be the only consideration in determining the petitioner's ability to pay the proffered wage. Counsel states that the petitioner is continuously growing and submits the petitioner's accounts receivable list as evidence of its recent receipts. CIS 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 (BIA 1967). 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 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*, CIS 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. CIS 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 CIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner was incorporated in 2002, after the priority date in the instant case.<sup>10</sup> While the petitioner's gross receipts increased from \$6,205 in 2002 to \$2,227,958 in 2005, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses during the relevant years. Further, the petitioner has not established its reputation within its industry. Since the beneficiary is currently employed by the petitioner, he would not be 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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

The director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, 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 (Act. Reg. Comm. 1977).

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<sup>10</sup> This office notes that the petitioner is not in good corporate standing in the State of Texas. *See* [http://ecpa.cpa.state.tx.us/coa/servlet/cpa.app.coa.CoaGetTp?Pg=tpid&Search\\_Nm=tic%20sales%20&Button=search&Search\\_ID=10206328733](http://ecpa.cpa.state.tx.us/coa/servlet/cpa.app.coa.CoaGetTp?Pg=tpid&Search_Nm=tic%20sales%20&Button=search&Search_ID=10206328733) (accessed August 26, 2008).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) **General.** 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 the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of field engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	blank
	High School	blank
	College	4
	College Degree Required	Bachelor's Degree
	Major Field of Study	Any Field

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked 40 hours per week for Telecommunication Installations Corp. (TIC) as a field engineer from October 1998 to the date he signed the Form ETA 750B and that he worked 44 hours per week as an engineer for Hyup Dong Communication Co. in Seoul, Korea from November 1991 to June 1998. He does not provide any additional information concerning his employment background on that form. Further, On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he represented that he received a bachelor's degree in public administration from Korea National Open University in Seoul, Korea in February 1988 and a bachelor's degree in computer science from Seoul National Polytechnic University in Seoul, Korea in 1990.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section

eliciting information about the beneficiary's last occupation abroad, he stated "N/A" above a warning for knowingly and willfully falsifying or concealing a material fact.

On appeal, counsel submits a Business Registration Certificate dated November 4, 1997 indicating that Hyub Dong Communications Co. was established on August 5, 1991 in Seoul, Korea with the beneficiary as the company's representative;<sup>11</sup> a Certificate of Career dated June 18, 1998 indicating that the beneficiary was employed by Korea Communications Engineering as an electrical engineer from October 18, 1977 to September 15, 1979 and from September 15, 1981 to October 15, 1991; an affidavit dated November 20, 2006 from the beneficiary certifying that he owned ██████████ Communications Co. and worked as a field electrical engineer from November 5, 1991 to December 1998;<sup>12</sup> and a Certificate of Career dated June 16, 1998 signed by ██████████ of the Korea Information & Communication Contractors Association indicating that ██████████ Communications Co. provided engineering services in Seoul Korea from November 5, 1991 to June 1998 (the date of the Certificate).<sup>13</sup> The record also contains the beneficiary's Certificates of Graduation and transcripts from Korea National Open University and Seoul National Polytechnic University; an educational evaluation dated July 7, 1998 from A.E.S.F., Inc.; and a Certificate of Career, signed by the beneficiary, indicating that the beneficiary served as President of ██████████ Communications Co. from November 5, 1991 to June 17, 1998 (the date of the certificate).

On appeal, counsel asserts that the beneficiary qualifies for the offered position. However, counsel did not specifically address the director's findings with regard to the beneficiary's education and employment. Specifically, the director noted discrepancies between the beneficiary's 2006 affidavit and information on the ETA Form 750B regarding the beneficiary's prior employment. Counsel failed to provide evidence to resolve the discrepancies. 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). Further, the director noted that Form ETA 750B does not list the beneficiary's employment prior to 1998 even though the Form ETA 750B instructs the beneficiary to list related employment. The director also noted that it is unclear how the beneficiary worked as an electrical engineer with no education or training in the field, and that it is unclear how the beneficiary worked full time as an electrical engineer while simultaneously pursuing two bachelor's degrees.<sup>14</sup> Counsel did not address these discrepancies on appeal.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience in the job offered from the evidence submitted into this record of

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<sup>11</sup> The Certificate does not establish the beneficiary's two years of experience in the proffered position. *See* 8 C.F.R. § 204.5(l)(3). Further, the Certificate list the types of services provided by ██████████ Communications Co. and does not indicate that ██████████ Communications Co. provided engineering services.

<sup>12</sup> The director noted in his decision that notarized statements from the beneficiary do not constitute evidence of the beneficiary's prior employment experience.

<sup>13</sup> The Certificate does not establish the beneficiary's two years of experience in the proffered position. *See* 8 C.F.R. § 204.5(l)(3).

<sup>14</sup> Pursuant to a Certificate of Career dated June 18, 1998, the beneficiary was employed by Korea Communications Engineering as an electrical engineer from October 18, 1977 to September 15, 1979 and from September 15, 1981 to October 15, 1991. In October, 1977, the beneficiary was only 19 years old and had not yet completed college, according to the education listed on the Form ETA 750B. 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. *Matter of Ho*, 19 I&N Dec. at 591.

proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the petitioner has not established that it is the successor-in-interest to the applicant listed on the Form ETA 750.<sup>15</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The DOL does not certify a Form ETA 750 labor certification on behalf of a potential employee/beneficiary, but rather to an employer/applicant. If the original employer is purchased, merges with another company, or is otherwise under new ownership, the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. See *Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1986).

In this case, the labor certification was issued to TIC Sales, Inc. [REDACTED] and the I-140 petition was filed by Telecommunication Installations Corp. (TIC) [REDACTED]. In a letter dated July 24, 2006 submitted with the petition, counsel claims that Telecommunication Installations Corp. (TIC) was reincorporated and the new name of the corporation is TIC Sales, Inc. If the original employer is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In addition, in order to maintain the original priority date, the successor-in-interest must demonstrate that the original employer had the ability to pay the proffered wage from the priority date in 1999 until the date of the change in ownership. Moreover, the successor-in-interest must establish its financial ability to pay the certified wage from the date of the change in ownership. See *Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). The record does not establish that TIC Sales, Inc. is the successor-in-interest to Telecommunication Installations Corp. (TIC). The record does not contain an asset purchase agreement, bill of sale or any other documentation evidencing that the petitioner assumed all of the rights, duties, obligations, and assets of Telecommunication Installations Corp. (TIC) and continues to operate the same type of business as Telecommunication Installations Corp. (TIC). 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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<sup>15</sup> The director noted this issue in his decision but it did not serve as a basis for denial of the petition. The petitioner did not address this issue on appeal.