U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 11 2007

WAC 06 026 53147

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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

The petitioner is an automotive transmission repair business. It seeks to employ the beneficiary permanently in the United States as a transmission mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence. 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 August 3, 2006 denial, the primary 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 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 U.S. Department of Labor. *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 U.S. Department of Labor 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is $19.45 an hour or $40,456 per year. The Form ETA 750 states that the position requires two years of work 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[1]. On appeal, counsel submits a statement from [redacted] or [redacted] dated September 2, 2006;[2] the petitioner's owner and spouse's Certificates of Naturalization, and notices with regard to name changes for both individuals; the marriage license of the petitioner's owner and spouse; a water and telephone bill in the name of Mr. [redacted], the husband of the petitioner's owner; an Assignment and Assumption Contract between the petitioner and the petitioner's owner and her spouse that states the petitioner's owners and husband accept all debts and liabilities of the petitioner as of the inception of the corporation incorporated on August 14, 2000 (this document is dated August 5, 2006); IRS Form 2553, Election by a Small Business Corporation, dated August 30, 2006;[3] two closing statements for two properties sold by the petitioner's owner; first pages of bank statements for the petitioner's owner, in the name of [redacted], or [redacted] for an account with Hanmi Bank, Los Angeles, California that cover the period of February 2003 to December 30, 2005; **Buyer's Closing Statements for two properties at [redacted] California, and [redacted]** California dated April 9, 2004, and September 22, 2005 bought by [redacted], (the petitioner's owner); and a promissory note between a borrower named [redacted] and the lender, [redacted] for $54,000.

In response to the director's request for further evidence date April 17, 2006, the petitioner also submitted its IRS Forms 1120, U.S. Corporation Income Tax Returns for tax years 2001 to 2005; the petitioner's owner and her spouse's jointly filed IRS Forms 1040 for tax year 2001 to 2004; the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return for the first quarter of 2001 to the last quarter of 2005, with corresponding Forms DE-6; the IRS Forms W-2 issued by the petitioner for tax years 2001 to 2005, two pages from an unidentified classified section of a telephone book that identified a business called "Hollywood Transmissions" at [redacted] California; the petitioner's articles of incorporation dated August 14, 2000; a lease agreement for the petitioner's work location with an extension of the lease until 2009; a page of a calendar for 2006 that identifies a business named Hollywood Transmission d/b/a New [redacted].; an advertisement in the Korean language identified as [redacted] 6722 N. Vermont Avenue, Los Angeles, California; and the petitioner's profit and loss statement for the first three months of tax year 2006 compiled by [redacted] Los Angeles, California, dated June 7, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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[1] 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).

[2] In her declaration, Mrs. [redacted] reiterates many of the statements made by counsel, and again states that the petitioner is a family business and that neither she nor her husband knows the distinction between corporation, partnership and sole proprietorship. She also describes various real estate properties bought and sold by she and her husband at profits that were then deposited in a money market account at Hanmi Bank.

[3] The petitioner filed this document to change its IRS tax filing status from a C corporation to an S Corporation for tax years after the tax filing election takes effect. Although counsel asserts on appeal that such an election would prove the petitioner is a continuing family business, the AAO notes that an S Corporation is also a separate legal entity from its shareholders, unlike a sole proprietorship.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on August 14, 2000, to have a gross annual income of $271,975, a net annual income of $133,366, and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claimed to have worked for the petitioner since December 1999.

On appeal, counsel asserts that the assets of the stockholders are separate and distinct from the assets of a corporation, however in an unpublished AAO decision, a footnote noted that the general rule that a corporation's liabilities are separate from its owners and shareholders might be amenable by alteration pursuant to contract or otherwise. Counsel notes that in this unpublished decision, the AAO decided that no evidence appeared in the record to indicate that the general rule is inapplicable in the petition. Counsel then cites a Board of Alien Labor Certification Appeals (BALCA) decision, *Madni, Inc. T/A Silver and Watch Palace,* 2004-INA-75 (BALCA 2005), that included the petitioner's evidence of a personal guarantee of the corporation's debts and liabilities. Counsel notes that in this decision, the recent personal bank statements of the petitioner were submitted along with an affidavit that guaranteed that the owner had personal funds to pay at least $2,225 over the course of the year. Counsel then cites *Matter of Ohsawa America,* 1988-INA-240 (BALCA 1988), in which the courts examined and decided the issue of a shareholder or owner's assumption of corporate liabilities. Counsel notes that in *Ohsawa America*, based on the apparent financial worth and continuing financial support of the major shareholder based on a letter from the Bank of America and the petitioner's accounting firm, the court found that the petitioner had shown there were sufficient funds to pay the proffered wage.

Counsel then states that the petitioner, New Vermont Transmission, Inc. has been in existence since 1998, as a sole proprietorship of Mr. [redacted] who had been in the transmission business since 1982, doing business as Vermont Transmission Shop, and working as the chief transmission mechanic. Counsel states that Mr. [redacted] married [redacted] in February 10, 1999 and that as a gesture of his love and commitment wished to transfer the business ownership to her. Counsel states that the petitioner's C.P.A. suggested that the easiest way to transfer the business was to incorporate the business. Counsel states that although Mr. [redacted] incorporated the business under the name of New Vermont Transmission, Inc. and issued all company stock to Ms. [redacted] the petitioner's business format or structure did not change at all rather the business was conducted as a sole proprietorship, getting utility bills and telephone bills under Mr. [redacted]'s name. Counsel notes that the wages and compensation paid to either Mr. [redacted] or Mrs. [redacted] at times were not reported as compensation of officers when it could have been, and from 2003 to 2005, both Mr. [redacted]'s salary and his wife's salary were reported as compensation of officers even though Mr. [redacted] is not an officer of the petitioner.

Counsel states that although the petitioner was incorporated as a commitment to the marriage of Mr. [redacted] and Ms. [redacted] it was not a method to separate the business liabilities from the personal liabilities of the petitioner's owner and husband. Counsel states that both Mr. [redacted] and his wife withdrew funds from the business for personal use as wages and salaries, and that Mr. [redacted] withdrew additional funds through his Forms 1099-MISC. Counsel also notes the petitioner's owner's and spouse's real estate purchases and sales, as well as the petitioner's owner's promissory note to her sister that was repaid with interest.

Counsel then asserts that the petitioner has the ability to pay the proffered wage, based on the petitioner's corporate tax returns from tax years 2001 to 2005. Counsel then adds together the petitioner's net current assets, depreciation, retained earnings, and the wages or compensation paid to the petitioner's owner or her spouse, Mr. [redacted] as either officer compensation, or as wages or paid in W-2 Forms or Forms 1099-MISC. Counsel states that when these items are added together, the petitioner has available funds of $46,887 in tax

year 2001; $51,005.02 in tax year 2002; $40,546, in tax year 2003; $40,889 in tax year 2004; and $61,382 in tax year 2005. Counsel states that these sums are sufficient to pay the yearly wage of $40,456 as of the priority date year of 2001 and through tax year 2005.

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, Citizenship and Immigration Services (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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's initial assertion on appeal with regard to the assets of shareholders or owners not being considered in these proceedings is correct. Despite counsel's claim regarding the operation of the petitioner's business, it remains a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Furthermore, on appeal, counsel submits bank statements from the Hanmi Bank in the name of the petitioner's owner, Ms. [redacted] or [redacted] Although not explicitly addressed by counsel, the reliance on the balances in this bank account as a source of additional funds with which to pay the proffered wage is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Fourth, the bank statements are in the name of the petitioner's owner, rather than the petitioner, and as such, would not be considered corporate financial assets.

On appeal, counsel refers to an unpublished AAO decision and to BALCA decisions for the proposition that the financial assets of a shareholder can be utilized in determining whether a corporate petitioner has the ability to pay a proffered wage. Counsel refers to a footnote in one unpublished AAO decision. Counsel does not provide any published citations for the AAO decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, the document submitted to the record on appeal, identified as an Assignment and Assumption Contract, is given no weight in these proceedings. The document states that the

petitioner's owner (the sole shareholder) and her husband will assume all the petitioner's debts, among other items, as of its incorporation on August 14, 2000 and into the future. This document, as previously stated, is dated August 5, 2006, almost six years after the petitioner's incorporation, and would not have been operative as of the 2001 priority date. Even if such a document were accepted as the type of evidence referenced by a footnote in an unpublished AAO decision, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel states that two Department of Labor's (DOL) BALCA cases are also applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company and that shareholder in question had personal assets of $4 million dollars. In the instant petition, the petitioner's sole shareholder does not have similar personal assets to the shareholder in *Ohsawa America.* Further, the petitioner shows very little increase in gross receipts with minimal net income or net current assets, as will be examined more fully further in these proceedings. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

With regard to the initial BALCA decision referenced by counsel, namely, *Madni, Inc. T/A Silver and Watch Palace*, 2004-INA-75 (BALCA 2005), the AAO notes that this decision is also not binding precedent. The AAO also notes that this decision, even if binding, would not be dispositive in the instant matter. In the decision, the court agreed with the petitioner that the certifying officer had abused his or her authority in not reviewing new evidence submitted on motion for reconsideration. The court then vacated the decision and remanded the matter to the certifying officer to make a ruling on the petitioner's request for reduction in recruitment. The court did not address the petitioner's ability to pay the proffered wage based on the petitioner's owner's bank statements or the owner's personal guarantee to pay the proffered wage.

Counsel's assertions with regard to the use of depreciation expenses, retained earnings, and the wages and/or compensation paid to the petitioner's owner and her spouse to supplement the petitioner's financial resources available to pay the proffered wage is equally not persuasive. The AAO does not consider depreciation expenses in its examination of the petitioner's net income, as will be more fully discussed further in these proceedings. Further, retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

With regard to adding the wages or compensation already paid to the petitioner's owner or her spouse, in general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The AAO has in certain circumstances examined officer compensation as a source of additional income, but usually in circumstances

involving entities such as personal service corporations in which the substantial income generated in such businesses is taken as officer compensation to avoid double taxation, or in businesses in which the officer compensation indicates the petitioner's ability based on its profitability to allocate some discretionary officer compensation as a source of additional funds with which to pay the proffered wage. In the instant petition, the officer compensation provided the petitioner's sole officer and the petitioner's profitability is minimal.[4] Thus, the suggestion to add back any officer compensation to the petitioner's net income is not persuasive.

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, in its response to the director's request for further evidence, the petitioner indicated that the petitioner had not paid any wages to the beneficiary and that he would not be hired until the approval of the I-140 petition. However, on the Form ETA 750, Part B, the beneficiary indicated that he had worked for the beneficiary since December 1999. Thus, the record contains a discrepancy. *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. The petitioner has not established that it employed and paid the beneficiary during the relevant period of time. Thus the petitioner has to establish its ability to pay the entire proffered wage of $40,456 in tax years 2001 to 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, contrary to counsel's assertion, 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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

[4] The officer compensation identified on Schedule E, of the petitioner's IRS tax forms, ranges from zero (0) in tax year 2001, $8,000 in tax year 2002, $10,500 in 2003, $14,000 in tax year 2004, and $18,200 in tax year 2005. None of these sums would be sufficient to pay the proffered wage of $40,456 as of the 2001 priority year date and through tax year 2005.

> 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $40,456 per year from the priority date:

- In 2001, the Form 1120 stated a net income[5] of $2,196.[6]
- In 2002, the Form 1120 stated a net income of $408.
- In 2003, the Form 1120 stated a net income of $823.
- In 2004, the Form1120 stated a net income of $1,182.
- In 2005, the Form 1120 stated a net income of $6,421.

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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.[7] 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 net current assets during 2001 were $1,884.
- The petitioner's net current assets during 2002 were -$3,412.
- The petitioner's net current assets during 2003 were -$1,335.

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[5]The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

[6] The director in her decision erroneously identified the petitioner's net income in tax year 2001 as $1,793, the figure on Line 30, taxable income minus net operating loss (NOL) deduction, rather than the figure on Line 28. The AAO notes that the director's error does not affect the ultimate outcome of the appeal.

[7]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.

- The petitioner's net current assets during 2004 were -$1,621.
- The petitioner's net current assets during 2005 were -$2,250.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. However, as previously stated, neither the petitioner's owner's assets, retained earnings, depreciation expenses, or the salaries or compensation paid to others may be considered when calculating the petitioner's ability to pay the proffered wage. Counsel also requests that the totality of the petitioner's circumstances be considered when examining the petitioner's ability to pay the proffered wage.

As previously stated, the AAO does consider the totality of the petitioner's circumstances when considering the petitioner's ability to pay the proffered wage, pursuant to *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). This decision relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

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

Beyond the decision of the director, the AAO notes that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered job. 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*, 299 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 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 U.S. Department of Labor 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 April 25, 2001.

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).

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 transmission mechanic. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	6
High School	3
College	Blank
College Degree Required	Not Required
Major Field of Study	Blank

The applicant must also have 2 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.[8] On Part 15, eliciting information of the beneficiary's work experience, he represented that he had worked for the petitioner since December 1999 as a transmission mechanic. In a subsequent correction approved by the Department of Labor office on September 22, 2005, an attachment to the Form ETA 750, Part B, dated May 28,2003, states the beneficiary worked from May 1995 to January 1999 in transmission repair for [redacted] Korea. The beneficiary does not provide any additional information concerning his employment background on that form. The petitioner did not submit a letter of work verification with the initial I-140 petition. Therefore the director in his request for further evidence dated April 17, 2006, requested

[8] The beneficiary indicated that he had attended Hongik College, Seoul Korea, from March 1983 to February 1985, studying design, and receiving a certificate for these studies. The beneficiary also indicated that he had attended Munil High School, Seoul, South Korea from March 1979 to February 1982. The petitioner submitted no further documentation of the beneficiary's school studies to the record.

evidence that the beneficiary possesses the required two years of work experience stipulated by the Form ETA 750.

In response the petitioner submitted a letter of work experience in the Korean language whose translation states that the beneficiary was employed in the [redacted] as a repairman specializing in Japanese transmission. The company's address is [redacted] The accompanying Certificate of Translation dated April 16, 2001 states that the translator, Sung H. Lee, is competent to translate from Spanish into English, and from English into Spanish. However, the document does not establish that the translator is competent to translate the Korean language. The translation of the letter of work experience does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

> T*ranslations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

This document and the difference in the name of the Korean company in which the beneficiary claims to have been employed, limits the weight to be given to the petitioner's letter of previous work experience. Without more persuasive evidence, the petitioner has not established that the beneficiary has the requisite two years of work experience as a transmission repairman.

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.