U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 13 2007

WAC 05 100 50318

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

The petitioner is a decorative painting business.[1] It seeks to employ the beneficiary permanently in the United States as a paint decorator.[2] 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 based on the petitioner's net income and balance sheets for tax years 2000 to 2002. 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 19, 2005 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.

---

[1] The petitioner identified itself as a construction company on the I-140 petition; however, materials in the record, including work contracts, and marketing materials support the petitioner's primary business as painting services.

[2] In an amendment requested by the petitioner, the Department of Labor amended the original Form ETA 750 to reflect fine cabinetry restoration as a job duty to be performed by the beneficiary and to reflect that the job required two years of work experience in a related occupation. The Department of Labor certifying officer added the additional job duty identifying the occupational title as 51-7021, Furniture Finisher, although the petitioner identified the job title as Paint Decorator. The AAO notes that the DOL amended the number of years of work experience in a related occupation from zero (0) to two years, without specifying the related occupation, and that the petitioner never references further the duties of a furniture finisher in any correspondence found in the record. The AAO will comment further in these proceedings on whether the beneficiary's work experience as documented on Form ETA 750, Part B, is sufficient to meet the stipulated requirements of Form ETA 750.

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 $22 an hour or $45,760 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered, or two years of work experience in an unidentified related occupation.

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.[3] On appeal, counsel submits a document entitled "Employer's Quarterly State Report of Wages Paid to Each Employee" that indicates that during the third quarter of 2005 the petitioner paid the beneficiary $5,200.

The petitioner also submits a memorandum written by [redacted] former Associate Director for Operations, Citizenship and Immigration Services (CIS) on determining a petitioner's ability to pay the proffered wage[4], a one-page unaudited document from [redacted], Burlingame, California that

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). In the instant petition, on June 14, 2005, in a request for further evidence, the director previously requested the petitioner's 2003 and 2004 tax returns, as well as copies of the petitioner's EDD Forms DE-6, Quarterly wage reports for all employees for the last three quarters that were accepted by the state of California. The director also requested that the petitioner complete all items circled in red on a copy of the instant I-140 petition. Upon review of the record, the petitioner completed the items circled in red on the I-140 petition copy and did not submit the remainder of the director's requested evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the DE-6 document dated June 30, 2005, or the petitioner's 1120 tax return for 2003 submitted on appeal. Nevertheless, the record in the instant case provides no reason to preclude consideration of the remaining documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

lists the petitioner's assets, liabilities and net worth as of September 30, 2005; the petitioner's Form 1120, U.S. Corporation Income Tax Return, for tax year 2003[5] that indicates taxable income before net operating loss deduction and special deductions of $24,594; Form DE-6 report for June 30, 2005 with no wages noted for the beneficiary;[6] statements for June, July and September 2005 for the petitioner's business interest checking account; a rental agreement between the petitioner and the owner of [redacted] California, dated July 5, 2005, and for another leased space in San Carlos, California; copies of the petitioner's contracts for four recently started or completed job contracts and thirteen pending contracts; the petitioner's marketing materials, and finally, materials that the petitioner describes as its "portfolio" that contains photographs of buildings on which the petitioner has worked to restore, repaint, or renovate painted surfaces.

With the initial petition, the petitioner submitted its Forms 1120 for the tax years 2000, 2001, and 2002; and its DE-6 Forms for the final quarter of 2003 and all four quarters of 2004. 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 a C corporation. On the petition, the petitioner claimed to have been established on July 1, 1997, to have a gross annual income of $1,600,000, a net annual income of $120,000, and to currently employ fourteen workers. On the Form ETA 750B, signed by the beneficiary on April 15, 2001, the beneficiary did not claim to have worked for the petitioner.

In his denial, the director stated the petitioner's taxable income for tax years 2000, 2001, and 2002 was insufficient to establish the petitioner's ability to pay the proffered wage of $45,760. The director stated that the petitioner's balance sheets had been reviewed and a review of the petitioner's liabilities and assets for tax years 2000 to 2002 indicated that the petitioner did not have adequate assets to pay the proffered wage.

On appeal, counsel cites the Yates memo and states that CIS failed to give sufficient weight to other evidence of the petitioner's ability to pay the proffered wage. Counsel states that the director did not consider the petitioner's net current assets. Counsel states that the petitioner's net current assets significantly exceed the proffered wage. Counsel also asserts tha[redacted]statement, along with the petitioner's current assets, bank statements, tax return for 2004, and the petitioner's financial statements are evidence of the petitioner's ability to pay the proffered wage. With regard to the petitioner's tax returns, counsel states that the petitioner's gross sales in 2000 exceeded $680,000; in 2001, were $489,000,[7] in 2002 were $1,070,000 and in

---

[5] As stated previously, on June 14, 2005, the director requested the submission of the petitioner's 2003 and 2004 tax returns. The record does not reflect that the petitioner submitted any further tax returns in response to the director's request for further evidence. Therefore the AAO will not consider the sufficiency of the petitioner's 2003 tax return in these proceedings.

[6] As stated previously, the director requested the petitioner's previous three DE-6 reports accepted by the state of California in his request for further evidence dated June 14, 2005. Since the petitioner was given until September 6, 2005 to respond, the DE-6 report for the third quarter would have been available for submission by the petitioner in response to the director's RFE. Thus, the AAO will not accept the second quarter DE-6 document submitted on appeal. The DE-6 report for the third quarter of 2005 would not have been available during the time period provided to the petitioner to respond to the director's request for further evidence. Therefore, it is accepted on appeal.

[7] It is not clear how counsel arrived at this figure for the petitioner's gross sales in tax year 2001. The petitioner's tax return indicates gross receipts/sales of $822,052.

2003 were $1,187,974. Counsel also states that in tax year 2000, the petitioner's assets were $97,904, while in 2002, the petitioner's assets were $154,754, and that in tax years 2003 and 2004, the petitioner's assets were comparable. With regard to the petitioner's current net assets, counsel states that [redacted] statement identified the petitioner's net worth as of September 30, 2005 as being $493,350 and identifies this figure as the petitioner's net current assets.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel asserts that director should examine the petitioner's net current assets, in accordance to guidance provided in the Yates memo. The AAO consistently adjudicates appeals in accordance with the Yates memorandum. Although the director refers to the petitioner's balance sheets, another name for Schedule L, in his decision, he provided no further explanation or analysis of this issue. The AAO will examine more fully whether the petitioner has sufficient net current assets to pay the proffered wage as of the 2001 priority date and through tax year 2002 in these proceedings.

Counsel also submits four 2005 bank statements for the petitioner's Bank of America business checking account. Counsel's reliance on the balances in these four bank statements 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. In the instant petition, the petitioner's 2005 bank statements would only reflect the petitioner's financial assets for a specific period of 2005, and could not establish that the petitioner had sufficient financial resources in its bank account as of the 2001 priority date. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that would not be reflected on the petitioner's 2005 tax return,[8] 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.

Further on appeal, counsel asserts that the petitioner's gross assets should be considered an additional manner of establishing the petitioner's ability to pay the proffered wage. However, counsel provides no further regulatory or statutory authority that such an analysis would be warranted in the consideration of a petitioner's ability to pay the proffered wage. The AAO will comment more fully on this issue further in these proceedings.

---

[8] The petitioner did not submit its 2005 tax return to the record, thus the analysis of this factor is not possible.

Finally counsel on appeal submits an unaudited one-page document from [redacted] identified as C.T.P. Professional Tax Practice Licensed Investment Advisor. [redacted] first identifies the petitioner's current assets and then combines this figure with the petitioner's property and equipment to calculate the petitioner's total assets. [redacted] then lists the petitioner's liabilities identified as accounts payables and subtracts this figure from the petitioner's total assets to arrive at the petitioner's total liabilities and net worth. However, 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. Therefore the AAO gives no evidentiary weight to [redacted] statement.

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, based on the breakdown of employees and wages for the third quarter of tax year 2005, the petitioner appears to have paid the beneficiary $5,200 in tax year 2005. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2003.[9]

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). Contrary to counsel's assertion on appeal, 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:

---

[9] It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's request for further evidence dated June 14, 2005. At this time, the petitioner's 2003 and 2004 income tax returns would have been available. The petitioner on appeal submits its 2003 tax return which as previously stated, the AAO will not consider in these proceedings. The petitioner's 2004 tax return is not found in the record. As noted previously, the petitioner did not submit its 2005 tax return to the record. Therefore the AAO will not examine whether the petitioner had sufficient net income or net current assets to pay the proffered wage in tax years 2003, 2004 or 2005.

> 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* at 537.

The petitioner submitted its federal tax return for tax year 2000 with the initial petition. However, the priority year for the instant petition is 2001. Thus, the petitioner's tax return for 2000 is not dispositive in these proceedings. Therefore the AAO will only examine the petitioner tax returns for tax years 2001, 2002 and 2003. As previously stated, the petitioner's tax return for 2004 is not found on the record, and at the time the record closed, the petitioner's 2005 tax return would not have been available. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $42,760 per year from the priority date:

- In 2001, the Form 1120 stated a net income[10] of $29,283.
- In 2002, the Form 1120 stated a net income of $36,730.

Therefore, for the years 2001 to 2002, the petitioner did not have sufficient net income to pay the proffered wage of $45,760.

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.[11] 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. As stated previously, the AAO will not consider the petitioner's 2003 tax return submitted on appeal in these proceedings. Therefore the AAO will only examine the petitioner's tax returns for tax years 2001 and 2002.

---

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

[11]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 2001 were $-593.
- The petitioner's net current assets during 2002 were $10,323.

The petitioner did not have sufficient net current assets to pay the proffered wage in 2001 and 2002.[12] 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. Counsel states that the petitioner's gross sales may be examined to determine whether the petitioner has the ability to pay the proffered wage. However, as previously noted, the AAO does not examine the petitioner's gross sales or receipts when it determines whether the petitioner has the ability to pay the proffered wage. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084. 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 AAO notes that the petitioner has submitted extensive documentation with regard to its current level of business operations, and with regard to wages paid to its employees in tax years 2004 and 2005. As noted previously, the AAO will consider the overall circumstances of the petitioner in its examination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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. The AAO in petitions analogous to the circumstances of the petitioner in *Sonegawa*, also considers the longevity of the business, the established historical growth of the business, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within the industry, whether the beneficiary is replacing a former employee or an outsourced service and the number of employees, when judging the viability of the petitioner's business.

---

[12] The AAO notes that the petitioner's tax return for tax year 2003, which was not accepted on appeal, indicates net current assets of $73,302. While this figure would have established the petitioner's ability to pay the proffered wage in tax year 2003, the petitioner would not have been able to establish its continuing ability to pay the proffered wage. 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).

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. For example, the record reflects a $7,000 increase in the petitioner's taxable income from tax year 2001 and 2002 accompanied by a slight decrease in gross receipts in the same two years. Furthermore, the record does not contain sufficient evidence with regard to the petitioner's business viability in the relevant years of 2003, 2004, and 2005 to establish the petitioner's overall circumstances as analogous to those of the petitioner in *Sonegawa*. Therefore the petitioner has not established that it has the ability to pay the proffered wage.

This office also notes that the petitioner has 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 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).

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).

As stated previously, the amended Form ETA 750 includes the additional job duty of fine cabinetry restoration, and the DOL Occupational Title assigned to the proffered position is Furniture Finisher. Based on the Form ETA 750, the beneficiary's work credentials consist of a professional certificate in the machine industry obtained in June 1992, in the Czech Republic, while the beneficiary's previous work employment appears to be from May 1993 to October 1996 and from November 1997 to May 2000 as a sheet metal worker/finisher, also in the Czech Republic. Although the job descriptions for paint decorator and furniture finisher contain descriptions of preparing surfaces for painting, and preparing paints, neither the job description contained on the Form ETA 750 or the job descriptions on the letters of work verification establish any prior work experience in fine cabinetry restoration. Therefore, the record does not establish that the beneficiary has any experience in fine cabinetry restoration. If the petitioner pursues this matter further, it should provide clarification on the required job duties and job title.

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.