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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 20 2008

LIN-06-257-52575

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 Director, Nebraska Service Center ("director"), denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant, and seeks to employ the beneficiary permanently in the United States as a cook, restaurant ("Chef"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's November 5, 2007 decision, the petition was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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).[1]

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.

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

[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).

> 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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001.[2] The proffered wage as stated on Form ETA 750 is $500 per week, which is equivalent to $26,000 per year based on a 40-hour work week. The labor certification was approved on July 6, 2006, and the petitioner filed the I-140 Petition on the beneficiary's behalf on September 5, 2006. The petitioner listed the following information: established: March 28, 1988; gross annual income: "see attached income taxes;" net annual income: "see attached income taxes;" and current number of employees: five.

On July 2, 2007, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence that the beneficiary had the required two years of prior experience as listed on the certified Form ETA 750; that [redacted] was the successor-in-interest to the initial ETA 750 applicant, [redacted] in order to validly continue processing under the labor certification; and that the petitioner had the ability to pay the proffered wage from April 30, 2001 to the present. The RFE specifically provided that the petitioner should submit its U.S. tax returns (with Schedule L included), or audited financial statements, as well as additional evidence such as profit/loss statements and/or personnel records. The petitioner responded. On November 5, 2007, the director determined that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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. On Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner provided the following evidence of wage payment to the beneficiary:

Year	Employer	Tax I.D. Number	W-2 Wages Paid
2006	[redacted]		$25,000
2005			$3,200
2005			$15,600
2004			$20,800
2003			$20,800

[2] The applicant listed on Form ETA 750 is "[redacted]" with an address of [redacted], Briercliff Manor, NY 10510. The petitioner listed on the Form I-140 is "[redacted]" with an address of [redacted], Briarcliff Manor, NY 10510. The petitioner submitted documentation related to a claim of successorship-in-interest, which we will discuss in detail below.

2002	[redacted]	$20,800
2001		$10,400

The petitioner also provided copies of three of the beneficiary's paychecks written on checks[3] for [redacted], which showed payments to the beneficiary in the amount of $478.50 on July 9, 2007, July 16, 2007, and July 23, 2007.

As the amounts that [redacted] paid in each year are less than the proffered wage, the petitioner is unable to establish its ability to pay the beneficiary the proffered wage based on prior wage payments alone made by that company. The petitioner must show that it can pay the difference between the wages paid and the proffered wage in the years 2001, 2002, 2003, 2004, and 2005. Further, for [redacted] Inc. to continue processing under the labor certification filed by [redacted] must demonstrate that it is the successor-in-interest to [redacted]. Therefore, the wages paid by [redacted]. would not demonstrate the petitioner's ability to pay the proffered wage unless it can validly demonstrate that it is the successor-in-interest to [redacted]. Otherwise, wages paid, and financial information related to one company, cannot be used to satisfy the petitioner's need to demonstrate that it can pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The petitioner provided the following documentation to show that [redacted]. had assumed all of the rights, duties, and obligations of the predecessor company: a copy of [redacted] Certificate of Incorporation; and a Bill of Sale, which provided that [redacted] sold the business to [redacted] Inc. "for and in consideration of the sum of TEN DOLLARS . . . ($10.00)."

As [redacted] valued its total assets at $86,338 on its 2004 tax return, selling the business to [redacted]. for $10 would not reflect that Ladino Inc. has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 481.

Therefore, we disagree with the director's decision in that it considers both the wages paid by [redacted] and [redacted] in determining the petitioner's ability to pay. Based on the foregoing, we do not agree that [redacted] has demonstrated that it is a valid successor-in-interest to [redacted]. 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

[3] The petitioner did not provide copies of the reverse sides of the checks to demonstrate that the checks were cashed.

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).

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. 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). 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.

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The petitioner submitted [redacted]s 2005 federal tax return, and [redacted]s federal tax returns for the years 2001 through 2005. The record demonstrates that [redacted] is structured as a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following net income for [redacted]

Tax year	**Net income or (loss)**
2005[4]	-$9,004

The record demonstrates that [redacted] is an S corporation. 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). Lucia Corporation does not list any additional income so we will take its net income from line 21:

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[4] Ladino Inc.'s 2005 tax return reflects that it incorporated on August 26, 2005.

Tax year	Net income or (loss)
2005	-$310
2004	-$2,766
2003	-$997
2002	-$535
2001	$5,333

[redacted]'s net income would not allow for payment of the beneficiary's proffered wage in any of the above years, even if the wages paid to the beneficiary were added to its net income. Similarly, [redacted]'s net income would not allow for payment of the beneficiary's wage even if the wages paid to the beneficiary were added to its net income. Further, [redacted] has not adequately established that it is the valid successor-in-interest to [redacted], so that [redacted]'s tax returns cannot be used to establish [redacted]'s ability to pay the beneficiary the proffered wage. *See Matter of M*, 8 I&N Dec. at 24.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

The following represents [redacted]'s net current assets:[5]

Tax year	Net current assets
2005[6]	not provided in response to RFE

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c. has not adequately established that it is the valid successor-in-interest to [redacted] so that [redacted]'s tax returns cannot be used to establish [redacted]'s ability to pay the beneficiary the proffered wage. *See Matter of M*, 8 I&N Dec. at 24.

[6] The petitioner did not initially submit [redacted]'s Form 1120 Schedule L, and, therefore, could not establish its ability to pay the proffered wage in 2005. The petitioner provided this document on appeal, however, the director's RFE specifically requested that the petitioner provide its federal tax returns, including the returns' Schedule L Forms. The petitioner failed to include its Schedule L for several of the tax returns submitted. 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). Therefore, the Schedule L's previously requested, but not submitted, will not be accepted on appeal to show the petitioner's ability to pay the proffered wage.

The following represents [redacted]'s net current assets:

Tax year	Net current assets
2005[7]	not provided in response to RFE
2004	not provided in response to RFE
2003	$21,604
2002	$11,855
2001	$20,338

Based on the [redacted]'s net current assets, it would be able to demonstrate its ability to pay the proffered wage in the years 2001 through 2003, if the wages paid to the beneficiary were combined with its net current assets. Regarding the years 2004 and 2005, as noted, the director's RFE specifically requested that the petitioner provide its federal tax returns, including the returns' Schedule L Forms. The petitioner failed to include its Schedule L for all revelant tax returns. 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). Therefore, the Schedule L's previously requested, but not submitted, will not be accepted on appeal to show the petitioner's ability to pay the proffered wage. Further, [redacted] has not established that it is the proper successor-in-interest to [redacted] to continue processing based on the labor certification that [redacted] filed on the beneficiary's behalf.

[redacted]'s accountant additionally provided a statement that he had been its accountant for fifteen years and that [redacted] "was able to pay $26,000 a year to any employee." The accountant further provided that "[redacted] . . . hire me to be the Accountant too, from the time they are in Business as: The [redacted] the [sic] are able to pay $26,000 a year to any employee."

The petitioner additionally provided bank statements for [redacted]. for the time period October 2006 to July 31, 2007.[8] The statements showed significant variation in the amounts that [redacted]. had in its account from a low balance of $968.32 (as of March 31, 2006) to a high balance of $14,707.35 (as of April 30, 2007). First, we note that bank statements, and funds in bank accounts are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not

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[7] The petitioner did not initially submit [redacted]'s Form 1120S 2004 or 2005 Schedule L, or in response to the RFE, and will not be accepted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

[8] [redacted]c. has not adequately established that it is the valid successor-in-interest to [redacted] Corporation, so that [redacted]'s bank statements cannot be used to establish [redacted] ability to pay the beneficiary the proffered wage. *See Matter of M*, 8 I&N Dec. at 24.

reflect whether the petitioner has any outstanding liabilities. Further, cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Form 1120S Schedule L, of those that were provided, and included in net current assets analysis above. The petitioner did not provide evidence to show that the funds in the petitioner's account represent funds beyond those listed on the petitioner's Forms 1120S federal tax returns.

The petitioner also provided personal bank statements for the corporation's main officer, for the time period September 9, 2005 to September 9, 2007. A corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. Therefore, the personal bank statements of [redacted] are not relevant to showing the petitioner's ability to pay the proffered wage.

On appeal, counsel cites to *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) and provides that the Board considered other factors besides net profit in determining the petitioner's ability to pay, including the petitioner's length of time in business, good will, as well as the petitioner's reasonable expectation of an increase in profitability based on hiring the beneficiary.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

Counsel, here, has not provided any evidence to show any large one-time incident impacting the business' finances, or other factor, which previously impacted its ability to pay the proffered wage. Additionally, by reviewing the petitioner's net income, as well as the petitioner's net current assets, the petitioner's financial status has been fairly considered. Additionally, concerning the petitioner's "reasonable expectation" of profitability from hiring the beneficiary, the petitioner is already employing the beneficiary, so that there would be no "expectation" in increase in profitability based on the beneficiary being employed as a permanent resident employee versus his current status just as an employee. Further, the petitioner has provided no documentation to outline potential profitability increases on any factor. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel then cites the petitioner's tax returns and contends that the tax returns would demonstrate the petitioner's ability to pay. Specifically, counsel contends that the director failed to consider Officer

Compensation in each of the years, which exceeds the proffered wage in each of the years from 2001 through 2005.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return.

The petitioner did not provide W-2 Forms or other supporting documentation to document wages that the officer of [redacted] earned, or provide a statement from the corporate officer that it was willing and able to waive part or all of his compensation to pay the beneficiary's wages.

Counsel next contends that the director failed to provide notice of his intent to deny the petition as he asserts would be required by 8 C.F.R. § 103.2(b)(16)(i); *Matter of Cuello*, 20 I&N Dec. 94, 06-98 (BIA 1989); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), and that the petitioner therefore did not have an opportunity to rebut the director's findings.

On July 2, 2007, the director issued an extensive RFE, pursuant to 8 C.F.R. § 103.2(b)(8), which identified multiple areas where the filed petition was deficient, and without sufficient evidence in support, could be denied. The RFE allowed the petitioner to address and provide evidence related to the following issues that it failed to initially adequately document: the issue of the beneficiary's required prior experience; the issue that the petitioner failed to demonstrate that [redacted] was the successor-in-interest to the initial ETA 750 petitioner, [redacted] and that the petitioner had the ability to pay the proffered wage from April 30, 2001 to the present.

Accordingly, the petitioner has failed to establish its ability to pay the proffered wage and that it is the successor-in-interest to the labor certification applicant.

Further, although not raised in the director's denial, the petitioner has failed to show that the beneficiary meets the requirements of the certified ETA 750. 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).

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" description for a Chef provides:

> Coordinates activities of food preparation, plans or participates in planning menu. Prepares from scratch specialty dishes. Prepares and cooks soups, meats, vegetables, desserts and other foodstuffs. Observes and test foods by smelling and tasting. Works with all kitchen equipment.

Further, the job offered listed that the position required:

> Education: none;
> Major Field Study: none;
>
> Experience: 2 years in the job offered, Chef;
>
> Other special requirements: none listed.

On the Form ETA 750B, the beneficiary listed his relevant experience as: [redacted]a, Ossining, NY, from February 1996 to December 1998, position: Chef.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which 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.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from [redacted], [no title provided], [redacted], Ossining, NY, dated April 9, 2001, which provided:

> [The beneficiary] worked for me as a cook. From February 1, 1996 to December 18, 1998. He worked fourty [sic] hours per week.
>
> His activities in the job were: homemade soup, tomato sauce, marinara sauce, pastas, variety of seafood, chicken, veal & fish Italian style, wedges & desserts.

The letter is deficient in that it fails to provide the title of the individual who provided the letter as required by 8 C.F.R. § 204.5(l)(3)(ii)(A).

Further, in another filing contained within the record of proceeding, the beneficiary provided discrepant information. On Form G-325, which the beneficiary submitted with another application, the beneficiary listed that he was employed with "[redacted] **Briarcliff Manor, NY," from** January 1995 to the present (form undated, but completed after May 2004). The beneficiary also listed on Form I-589 that he was employed with [redacted] from January 1995 to present (the form was stamped November 23, 2004).

Both Form G-325 and Form I-589 provide that the beneficiary was employed with the [redacted] from January 1995 **onward. The beneficiary does not list on either form that** he was employed at, or also employed at [redacted] during this time period. The dates that the beneficiary listed he was employed at [redacted] therefore conflict with his listed employment with [redacted] thus casting doubt on the validity of the employment letter supplied to document the beneficiary's experience prior to [redacted]. 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. 582, 591 (BIA 1988). 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. *Id.* at 591-592.

Further, it appears that the beneficiary is related to the owner of [redacted] None of the documentation that the petitioner provided specifically lists the company's principal officer or owner, however, we note that the beneficiary has the same surname, [redacted] New York State Corporate **records list** [redacted] **'s Chairman or Chief Executive Officer, as well as its Principal Executive Officer as** [redacted].[9] **It would appear based on the common surname that the beneficiary is** related to the owner.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Further, where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

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[9] *See* (http:appsext8.dos.state.ny.us/corp public/CORPSEARCH.ENTITY_INFORMATION?p _nameid=3254), accessed March 12, 2008. Form I-589 lists that one of the beneficiary's siblings is [redacted], but that [redacted] is deceased. It is unclear from the record when [redacted] **died, if** the listed CEO is the same [redacted], or whether [redacted] s information was used to incorporate the company.

Additionally, the petitioner provided bank statements for [redacted], which shows checks written to an [redacted]

Further, although we again note that the documentation to show that [redacted] is the valid successor to [redacted] is insufficient, even if [redacted] could establish itself as the valid successor, it is not clear from the record that [redacted] would need a chef, the position offered in the initial labor certification.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2).

The tax returns for [redacted] provide that its primary business activity is as a restaurant that serves food. The tax returns for [redacted] list that its primary business activity is as a "coffee shop" that serves food. Whether a coffee shop would require a chef that "prepares and cooks soups, meats, vegetables, desserts and other foodstuffs" is unclear, as a coffee shop might serve mainly coffee, tea, and limited sandwiches or dessert. Accordingly, it is unclear that [redacted] would employ the beneficiary in the position offered as a Chef. *See* 20 C.F.R. § 656.30(c)(2)

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that [redacted] was the valid successor-in-interest to [redacted] and that the beneficiary met the requirements of the certified ETA 750. Accordingly, 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.