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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 05 2009
SRC 07 010 53292

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automotive diagnostics company. It seeks to employ the beneficiary permanently in the United States as an electrical diagnostician. 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 2003 priority date of the visa petition. 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 February 26, 2007 denial, the single issue for the director's denial was 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. The AAO will outline an additional deficiency on appeal.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [U.S. Citizenship and Immigration Services (USCIS)].

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 May 30, 2003. The proffered wage as stated on the Form ETA 750 is $18.75 per hour, or $39,000 per year.[1] The Form ETA 750 states that the position requires two years of experience in the proffered job.

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 relevant evidence in the record, including new evidence properly submitted on appeal.[2] On appeal, counsel submits a brief, a copy of an email message sent by the petitioner's president, on March 5, 2007 to a person identified as "[redacted]" and three documents entitled "Transactions by Payroll Item" that list the beneficiary's weekly paychecks, dates received, check number and the weekly wages and cumulative wages paid for the years 2003, 2004, and 2006.[3]

With the initial petition, the petitioner submitted its IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2004 and 2005,[4] and a Form 1040 for tax year 2003, with no accompanying Schedule C. The petitioner also submitted a document dated September 5, 2002, from the County Clerk of Harris County, Texas that identifies the petitioner's name, [redacted], to be the assumed name of the corporation [redacted] as well as a Certificate of Incorporation and Articles of Incorporation for [redacted]. dated May 18, 2001.

In response to the director's Request for Evidence (RFE) dated December 1, 2006, the petitioner submitted its unaudited Profit and Loss Statements and Balance Sheets for tax years 2003 to 2006, as well as copies of the beneficiary's W-2 Wage and Tax Statements for tax years 2003 to 2006. The W-2 documents indicate the petitioner paid the beneficiary $33,750 in tax year 2003; $34,200 in 2004;

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[1] In his offer of employment letter submitted with the I-140 petition, [redacted] the petitioner's president, identified that the petitioner would pay the beneficiary $46,800 a year. Based on the hourly rate of $18.50 for 2080 annual hours of work, the petitioner must demonstrate that it can pay the proffered wage of $39,000.

[2] 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).

[3] In the copy of the email that counsel submits with these three reports, [redacted] refers to four reports for the years 2003 to 2006. However, the record only reflects three reports. [redacted] also notes that the beneficiary's base pay was $750 a week, and that any discrepancy between the weekly amounts and the total proffered wage is because the beneficiary took unpaid time off.

[4] The Forms 1120S are filed by Fazio4, Inc. with Employer Identification number (EIN) [redacted] Form 1120S identifies the petitioner's effective date of S Corporation election as June 1, 2001.

$34,125 in 2005, and $37,050 in 2006. Although counsel in the petitioner's response stated that the petitioner was structured as an S Corporation in tax year 2003, counsel resubmitted a Form 1040 filed by the petitioner's owner for tax year 2003.[5] The petitioner also submitted copies of the beneficiary's U.S. income tax returns for tax years 2003 to 2006. The record does not contain any other evidence with regard to the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the difference between the beneficiary's actual wages and the proffered wage is based on unpaid leave or vacation that the beneficiary took during tax years 2003 to 2006. Counsel also states that the methodology utilized by the director in her decision is flawed. Counsel asserts that when the beneficiary of a labor certification has been an employee and has been receiving wages, USCIS should allow some speculation in the ability to pay where there is a small difference between the actual wages paid and the proffered wage. Counsel notes that businesses always have options available to them for lines of credit to handle low cash flow gaps. Counsel states that it does not make sense the petitioner could pay the beneficiary $37,050 in wages in a tax year, but not find among its financial resources sufficient funds to pay other wages when and if the work is actually performed. Counsel states that the law must take into consideration business realities and not utilize abstract figures in accounting that consider intangibles such as accumulated depreciation and amortizations. Counsel states the reality of the petitioner's situation is that the petitioner has the ability to pay the beneficiary's wages and does in fact pay the beneficiary the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation in tax years 2004 to 2006. Although counsel asserts in the petitioner's response to the director's RFE that the petitioner was structured as an S Corporation in tax year 2003, she instead refers to Schedules contained in the petitioner's owner's individual tax return in support of her assertion, does not provide the petitioner's 2003 IRS Form 1120S to further support her assertion.[6] Thus, the petitioner's actual business structure is not established in the record. On the petition, the petitioner claimed to have been established on August 5, 2001, to have a gross annual income of $580,000, a net annual income of $16,500, and to currently employ five workers. On the Form ETA 750, signed by the beneficiary on November 10, 2005, the beneficiary claimed to have worked with the petitioner since October 2001.

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

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[5] The director in her RFE had requested the petitioner submit the appropriate schedules for tax year 2003, based on the previous filing of the IRS Form 1040 with the initial I-140 petition. However, as the petitioner's tax return identifies the company was an S Corporation since 2001, this would be in error. The petitioner would have filed its taxes on Form 1120S in 2001, 2002, and 2003.

[6] The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The AAO notes that the director examined the petitioner's Profit and Loss and Balance Sheet statements for tax year 2003 in her denial of the petition. However, the director's reliance on the petitioner's unaudited Profit and Loss and Balance Sheet statements for tax year 2003 is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In the instant matter, counsel asserted in the petitioner's response to the director's RFE that the petitioner was an S corporation in tax year 2003, but instead refers to Schedule D and K of the petitioner's president's individual 2003 tax return in support. As the petitioner was an S Corporation in that year, it was required to file a corporate tax return in tax year 2003, which the petitioner did not submit. The petitioner's president's individual tax return for tax year 2003 is not sufficient to examine the petitioner's ability to pay the proffered wage in tax year based on its net income or net current assets.[7] Neither counsel nor the petitioner provides any explanation for why the petitioner's 1120S for tax year 2003 is not found in the record. The AAO will not consider the petitioner's unaudited profit and loss or balance statements in this proceeding, or the petitioner's president's individual tax return for 2003.[8] Thus, the record does not contain any regulatorily prescribed evidence as to the petitioner's ability to pay the proffered wage in tax year 2003. For this reason alone, the petition can be denied. For illustrative purposes and to correct another analytical error with regard to the petitioner's net current assets in the director's decision, the AAO will examine the remaining tax returns submitted to the record.

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[7] 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

[8] Even though the director correctly determined that the petitioner did not have the ability to pay the difference between the beneficiary's actual wages and the proffered wage based on the profit and loss statement, the AAO withdraws the director's analysis contained in her decision.

On appeal, counsel refers to the use of lines of credit to establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms,* 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In response to the director's RFE, the petitioner submitted W-2 Forms for the beneficiary that established the petitioner had paid wages to the beneficiary as of the 2003 priority date and through 2006; however, the petitioner did not establish that it paid the proffered wage to the beneficiary during this relevant period of time. The W-2s exhibit the following wages paid: $33,750 in tax year 2003; $34,200 in 2004; $34,125 in 2005, and $37,050 in 2006. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of $39,000 from the 2003 priority year through 2006. The difference between the beneficiary's actual wages and the proffered wage during this period of time is as follows: $5,250 in 2003; $4,800 in 2004; $4,875 in 2005; and $1,950 in 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other

expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that 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 proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between the wages paid and the proffered wage of $39,000 per year from the priority date:

- In 2003, the petitioner did not provide its Form 1120S for the priority year.
- In 2004, the Form 1120S stated a net income[9] of -$16,230.

[9]Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. In the instant matter, the AAO notes that only in tax year 2006, did the petitioner in the instant petition have an additional deduction that reduced the petitioner's actual net

- In 2005, the Form 1120S stated a net income of -$12,099.
- In 2006, the Form 1120S stated a net income of $36,791.

Therefore, for the year 2003, the petitioner cannot establish that it had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage. In tax years 2004 and 2005, the petitioner did not have sufficient net income to pay the difference, while in tax year 2006, the petitioner established that it had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wages, namely, $1,950.

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, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS 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.[10] 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 director in her denial of the instant petition calculated the petitioner's net current assets for tax years 2004 and 2005 by combining the petitioner's negative net income for tax years 2004 and 2005 with the petitioner's negative net current assets for the same two years. This approach is incorrect because net income and net current assets are not cumulative. Net income and net current assets are two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-

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income in that year. Thus, the petitioner's net income for tax year 2006 is found on line 18, Schedule K. For tax years 2004 and 2005, the petitioner's net income is found on line 21, of the Form 1120S.

[10] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with the director that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. The petitioner's net current assets for tax year 2004 is -$151,412, and for tax year 2005 is -$173,808. Therefore, for the years 2004 and 2005, with the corrected net current assets figures, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the 2003 priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2006.

Counsel on appeal submits a letter from [redacted] who states that the differences between the beneficiary's actual wages in tax years 2003 to 2006 and the proffered wage of $39,000 are due to the beneficiary taking unpaid leave or vacation. [redacted] submits payroll records of checks issued to the beneficiary for tax years 2003, 2004, and 2006. As the petitioner submitted W-2 Forms for the beneficiary, payroll record do not provide any additional evidence of the petitioner's ability to pay the proffered wage. The petitioner must demonstrate its ability to pay the proffered wage. Whether the beneficiary took vacation or unpaid leave may effect his total wages paid, but is irrelevant to the question of the petitioner's ability to pay the proffered wage.

Beyond the director's decision, the AAO would also question whether the petitioner has established that the beneficiary has the requisite two years of work experience as a electric diagnostician. 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 May 30, 2003.

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

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a

description of the training received or the experience of the alien.

(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 determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

With the initial petition, the petitioner submitted a copy of a letter written by [redacted] dated September 21, 2006. [redacted] identified himself as "Former employer of [redacted] Houston, Texas. In his letter, [redacted] stated that the beneficiary worked exclusively as his chief electronic diagnostic specialist from February 5, 1999 to October 19, 2001.

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 an electric diagnostician. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	8
High School	4
College	N/A
College Degree Required	None
Major Field of Study	None

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. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked as an automotive technician-electrical systems for from August 1998 to November 2001. The

beneficiary also represented that he had worked full-time for the petitioner as an automotive electrician from October 2001 to November 10, 2005, the date he signed the ETA Form 750, Part B.
The AAO notes that the dates of employment stated by [redacted] in his letter conflicts with the dates of employment stated by the beneficiary on the Form ETA 750, Part B. While [redacted] stated that the beneficiary worked for his company from February 5, 1999 to October 19, 2001, the beneficiary indicated that he worked for [redacted] from August 1998 to November 2001. *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 AAO notes that the beneficiary's claimed employment with the petitioner prior to the 2003 priority date has not been sufficiently documented by corroborative evidence to the record to further establish this employment. Without further clarification of the record, the petitioner has not established that the beneficiary has two years of prior work experience as an electrical diagnostician stipulated on the Form ETA 750.

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.