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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 09 2009

SRC 06 138 52319

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on a motion to reopen. The Motion will be granted. The decision of the director will be affirmed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a manager-travel agency. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

As set forth in the director's denial dated January 25, 2007, the single 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.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part:

> *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does qualify as a motion to reopen as counsel presents new facts that relate to the initial evidence together with supporting documentation.

The record shows that the motion is properly filed and timely. 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.

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 at 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.

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 DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The petitioner filed the Form I-140 on March 29, 2006, and the petitioner identified on that form is Alara Travel Corp. The proffered wage as stated on the Form ETA 750 is $63,773.00 per year.[1] The Form ETA 750 states that the position requires two years of experience in the proffered position or two years in the related occupation of travel agent.[2]

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).[3] 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.

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; a letter from the petitioner by [redacted] dated February 10, 2006; an explanatory letter from counsel dated August 22, 2006; the petitioner's Occupational License Tax license for 2005/2006; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2001, 2002, 2003, 2004, and 2005;[4] the

[1] The petitioner initially listed the wage as $20,800.00. However, the wage was increased to $63,773.00 prior to certification. The petitioner initialed and dated the changes.

[2] The petitioner submitted a letter dated February 10, 2006. The letter states that the position requires two years experience in the offered job *and* two years experience in a related occupation.

[3] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

[4] A corporation is a separate and distinct legal entity from its owners and shareholders. Therefore, 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*,

petitioner's unaudited financial statements (balance sheets) dated December 31, 2001, December 31, 2002, December 31, 2004, December 31, 2005, and June 30, 2006; the petitioner's financial statement for the six months ending June 30, 2006; the petitioner's financial statements (income statements) for the twelve months ending December 31, 2001, December 31, 2002, December 31, 2003, and June 31, 2004; approximately 18 pages of the petitioner's Ocean Bank business bank checking statements for the period May 31, 2005, to August 31, 2005; approximately 8 pages of the petitioner's Bank of America business bank checking statements for the period December 1, 2005, to February 28, 2006; approximately 38 pages of the petitioner's Wachovia business bank checking statements for the period January 1, 2005, to December 30, 2005; the petitioner's Ocean Bank letter of credit and Airlines Reporting Corporation letter of bond instrument; the lease for the petitioner's business premises dated July 2004; the beneficiary's personal joint tax U.S. Internal Revenue Service (IRS) Form 1040 tax return for 2004, with a W-2 statement from the petitioner to the beneficiary in the amount of $17,200.00; documentation concerning the beneficiary's qualifications; other personal tax returns of the beneficiary and her spouse; and other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were $1,972.00 and $4,912,766.00 respectively.

On appeal, counsel asserts that USCIS "did acknowledge that the Petitioner does have the ability to pay the proffered wage at this time (referring to the director's decision to deny the petition on January 25, 2007)." A more accurate statement of the director's decision is "the [petitioner] may have the ability to pay the offered wage at this time" but the director then stated that the evidence submitted in the record does not establish that the petitioner had the ability to pay the proffered wage from the priority date.

Counsel states that wages and compensation paid to the beneficiary in 2006 is evidence of the petitioner's ability to pay the proffered wage.

According to counsel, the compensation paid by the petitioner to the beneficiary in 2005 in combination with the net assets of the petitioner (as defined by counsel) for that year is evidence of the petitioner's ability to pay the proffered wage.

Counsel contends that the petitioner's bank statements submitted into evidence "reflects" the petitioner's ability to pay the proffered wage from the priority date to the present.

Counsel states that cash in the petitioner's bank account at the end of the 2002 tax year, in combination with an outstanding loan to an employee, a security deposit, the petitioner's net income

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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."

and the salary of the general manager who was replaced, are all evidence of the petitioner's ability to pay the proffered wage.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date in 2001.

Counsel asserts that the events of September 11, 2001, caused the petitioner a loss of revenue because of that event.

Accompanying the appeal, counsel submits a legal brief dated February 21, 2007, and additional relevant evidence which is a letter from the petitioner dated February 20, 2007; the petitioner's amended U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2005, and 2006;[5] the petitioner's unaudited financial statements (balance sheets) dated December 31, 2005, and December 31, 2006, and the petitioner's financial statements (income statements) for the twelve months ending December 31, 2005, and December 31, 2006;[6] a IRS Form 1099-MISC statement to the beneficiary from the petitioner in 2006 in the amount of $42,973.00, and a IRS Form Wage and Tax Statement (W-2) to the beneficiary from the petitioner in the amount of $20,800.00 in 2006; the beneficiary's personal joint tax U.S. Internal Revenue Service (IRS) Form 1040 tax return for 2005, with its attached Schedule C stating gross receipts from her services as manager of the petitioner of $42,973.00; approximately 100 pages of the petitioner's Wachovia business bank checking statements for the period January 1, 2003, to December 30, 2005; approximately 87 pages of the petitioner's First Union business bank checking statements for the period December 30, 2000, to December 31, 2002; approximately 77 pages of the petitioner's Ocean Bank business bank checking statements for the period January 31, 2003, to March 31, 2006; and five exhibits entitled "ARC Sales by Week" for 2001, 2002, 2003, 2004, and 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142

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[5] According counsel's letter dated February 21, 2007, the petitioner's 2005 tax return was amended to reflect compensation paid to the beneficiary as an independent contractor as well as to show the petitioner's investment in two corporations. The original 2006 tax return was not submitted.

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

(Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (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 (BIA 1967).

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 the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

On the Form ETA 750 signed by the beneficiary on April 16, 2001, the beneficiary did claim to have worked for the petitioner as a travel agent from February 1996, to present (i.e. April 16, 2001). According to the counsel's letter dated February 10, 2006, "The Beneficiary ... has been on the payroll of the Petitioner Company in the proffered position since February 1996." Despite the petitioner's assertion that it employed the beneficiary since 1996, the petitioner did not submit any evidence of wage or compensation payments made to the beneficiary for years prior to 2004.[7]

Counsel submitted the beneficiary's joint personal tax IRS Form 1040 tax return for 2004, with a W-2 Statement stating wages paid by the petitioner to the beneficiary in the amount of $17,200.00.

Counsel submitted the beneficiary's joint personal tax U.S. Internal Revenue Service (IRS) Form 1040 tax return for 2005, with a W-2 statement stating that the beneficiary received $20,800.00 in wages from the petitioner. The beneficiary later amended this return to state additional compensation paid by the petitioner in the amount of $42,973.00.

On appeal, counsel also submitted a IRS Form 1099-MISC statement to the beneficiary from the petitioner for the years 2005 and 2006 in the amount of $42,973.00, and also for 2006, an IRS Form Wage and Tax Statement (W-2) to the beneficiary from the petitioner in the amount of $20,800.00. The combined W-2 wages and 1099 income would equal $63,773.00 in each year. The petitioner submitted a letter from its accountants dated February 19, 2007 explaining the amended returns subsequent to the director's January 25, 2007 decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

There is no other wage payment evidence by the petitioner to the beneficiary in the record.

[7] The petitioner's tax returns show minimal salaries paid to its employees in the years for which tax returns were submitted. No costs of labor are stated. It is unclear that the petitioner employs its work force directly.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 2001 priority date until the present. Since the proffered wage is $63,773.00 per year, the petitioner must establish that it can pay the beneficiary the full wage from 2001, 2002, and 2003, and the difference between wages actually paid and the proffered wage, which in 2004 is $42,973.00. In 2005 and 2006, the petitioner paid the beneficiary the proffered wage based on the additional Form 1099s issued, and the amended tax returns filed in 2007.

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 sales and profits that exceeded the proffered wage 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.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income[8] (Sch. K, line 23) of $284.00.
- In 2002, the Form 1120S stated net income (Sch. K, line 23) of $4,517.00.
- In 2003, the Form 1120S stated net income (Sch. K, line 23) of $5,043.00.
- In 2004, the Form 1120S stated net income (Sch. K, line 17.e) of $1,972.00.
- In 2005,[9] the Form 1120S stated net income (Sch. K, line 17.e) of

[8] 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 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).

[9] On appeal counsel submitted amended 2005 and 2006 tax returns. The petitioner's net income and

$2,315.00.

- In 2006, the Form 1120S stated net income (Sch. K, line 18) of $12,125.00.

Since the proffered wage is $63,773.00 per year, the petitioner did not have sufficient net income to pay the proffered wage in 2001, 2002, 2003, and 2004. Additionally, the petitioner's net income would not exceed the difference between wages actually paid in 2004 and the proffered wage. In 2005 and 2006, the petitioner paid the beneficiary total amounts in wages and compensation equaling the proffered wage according to the amended U.S. tax returns.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages and compensation 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. 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 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001, 2002, 2003, 2004, and 2005, were <$10,597.00>,[11] <$6,320.00>, <$17,187.00>, $7,765.00, and $19,978.00 respectively.

Based on the petitioner's net current assets for years 2001, 2002, 2003, and 2004, the petitioner cannot demonstrate its ability to pay the proffered wage even if the petitioner's net current assets are combined with wages paid to the beneficiary in 2004.[12]

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net current assets figures are unchanged from the original filed tax returns for 2005. The original 2006 tax return was not submitted.

[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.

[11] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Accordingly, from the priority date or when the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax years 2005 and 2006.

Counsel asserts in his appeal brief that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[13] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel contends that the petitioner's bank statements submitted into evidence "reflects" the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L in determining the petitioner's net current assets.

Counsel states that cash in the petitioner's bank account at the end of the 2002 tax year, in combination with an outstanding loan to an employee,[14] a security deposit, the petitioner's net income and, the salary of the general manager who was replaced is evidence of the petitioner's ability to pay the proffered wage. As already stated above, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. Further, a review of Schedule L of the 2002 tax return does not demonstrate that the petitioner characterized the loan as a current asset. The security deposit for the reason stated above is not a current asset, and, it is not stated on Schedule L of the 2002 tax return as a current asset.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date in 2001. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically

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[12] In 2004, the difference between the combined wages paid/net current assets and the proffered wage is $38,808.00.

[13] 8 C.F.R. § 204.5(g)(2).

[14] There is no evidence that the term of the employee loan is shorter than one year or that it was included on the tax return as a current asset.

covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel asserts that the events of September 11, 2001, caused the petitioner a loss of revenue. In 2001, the petitioner's gross receipts were $2,252,530.00, and in 2002, $2,519,334.00. Therefore, the petitioner's gross receipts rose in the succeeding year by 12%. The record of proceeding contains no evidence such as a statement of the petitioner's gross receipts in 2000 to compare the years or evidence in the federal tax returns demonstrating a decline. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001.

Counsel advised that the beneficiary replaced a "former" worker who was paid $21,528.00 and worked as a general manager from 1996 to 2004. As already stated on the Form ETA 750 signed by the beneficiary on April 16, 2001, the beneficiary claimed to have worked for the petitioner as a travel agent from February, 1996 to present (i.e. April 16, 2001).

According to the counsel's letter dated February 10, 2006, "The Beneficiary ... has been on the payroll of the Petitioner Company in the proffered position since February 1996." It is unclear how the beneficiary replaced a worker with whom she worked along side for eight years. If the petitioner is combining the duties of two positions, then the position is not as stated in the labor certification. There is no evidence that the position of the general manager involves the same duties of manager-travel agency as those set forth in the Form ETA 750. Additionally, the employee referenced still appears on the petitioner's 2006 federal tax return as a shareholder. The petitioner's letter refers to the other worker as a "former employee," and does not reference his current status as a "current company **shareholder." Further, the wages paid to the former employee "averaged" $21,528.00. The** beneficiary's proffered wage is three times that amount. It would appear unlikely that the beneficiary would be performing the same duties.

The record does not verify the full-time employment of the general manager, or provide evidence that the petitioner has replaced him with the beneficiary since according to the above; the beneficiary has been employed since 1996. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, the petitioner has not documented the position, duty, and termination of the worker. If that employee performed other performed other kinds of work, then the beneficiary could

not have replaced him.[15]

By implication, the petitioner has stated that the totality of the petitioner's circumstances should be considered in the determination of the petitioner's ability to pay the proffered wage.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner's net current assets during 2001, 2002, 2003, 2004, and 2005, were <$10,597.00>, <$6,320.00>, <$17,187.00>, $7,765.00, and $19,978.00 respectively. For the same years, the petitioner's net income/loss was $284.00, $4,517.00, $5,043.00, $1,972.00, and $2,315.00 respectively. The petitioner's tax returns reflect minimal salaries paid to workers ($77,000.00 in the highest year), no officer compensation paid and no cost of labor expense (with the exception of the amended returns showing monies paid to the beneficiary).

Therefore, for the years examined the petitioner demonstrated nominal profits and mostly negative net current assets. While the petitioner demonstrates substantial gross receipts for the years for which tax returns were submitted, the petitioner also exhibits equally high costs of goods sold in each year, off-setting those gross receipts. As an example, the petitioner's 2001 gross receipts were $2,252,530.00, but its purchases were $2,092,034.00, leaving minimal net income of $284.00 after deducting other business costs.

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[15] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the period 2001, 2002, 2003, and 2004, was an uncharacteristically unprofitable period for the petitioner.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains permanent residence.

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, USCIS must look to the job offer portion of the alien 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). 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 Manager, Travel Agency partially provides:

> Plans itineraries, and arranges accommodations and other travel services for customers of travel agency: converses with customer to determine destination, mode of transportation, travel dates, financial considerations and accommodations required. Provides customer with brochures and publications . . . books transportation, and hotel reservations . . . collects payment . . . from customer.

Further, the job offered listed that the position required:

Grade School:	8 years
High School:	4 years
Education:	none

Major Field Study: none

Experience: 2 years in the job offered, Manager, Travel Agency,
2 years in the related occupation of Travel Agent.[16]

Other special
requirements: Must speak, read, and write Spanish .

On the Form ETA 750B, the beneficiary listed her relevant experience as: (1) the petitioner, Miami, Florida, from February 1996 to the present (date of signature, April 16, 2001), position: Travel Agent; (2) Chasquitor, Miami, Florida, March 1993 to January 1996, Travel Agent.

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 Chasquitor Travel, Courier & Services, Miami, Florida, July 1, 2006;
> Position title: travel agent;
> Dates of employment: February 22, 1993 to January 26, 1996;
> Description of duties: "She was responsible for planning itineraries including arrangins [sic] accommodations and travel services for Chasquitour

[16] The petitioner's February 10, 2006 letter states that the position requires two years experience in the offered job *and* two years experience in a related occupation, rather than two years in the job offered or two years in the related occupation.

> customers. [The beneficiary] computerized the costs of travel and accommodations using carrier tariff and hotel rate books."

However, the record contains the beneficiary's 1994 federal tax return. The beneficiary's federal tax return reflects wages of only $4,993, and a W-2 statement from Furshie, Inc. showing compensation in the amount of $193.38. The tax return or W-2 statement would not reflect that the beneficiary was employed at Chasquitor Travel, or if she was, that she was employed on a full-time basis to establish that she had the required two years of prior experience. 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 592.

The record also contains several documents: a "certificate of practice," dated January 21, 1993 for employment from September 1992 to December 1992; a letter listing employment from September 1, 1993 to January 1, 1993; a letter documenting workshop participation on October 18, 1991; a certificate of work as a counterperson from January 5, 1992 to February 10, 1992; a "certificate of completion" from the Director General of Academic Registration Office of Tourism; certificate of grade; and diploma for tourist management. However, these documents lack the requisite statement that the translation complies with the terms of 8 C.F.R. § 103.2(b)(3):

> Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In the present case, the translator [none is listed on the translated documents] failed to certify that the translation is complete and accurate, and that he/she is competent to translate from the foreign language in question into English.

Additionally, the petitioner states that it has employed the beneficiary from 1996 to the present. The petitioner has submitted W-2 statements for the beneficiary for the years 2004, 2005 and 2006. However, the petitioner did not submit any W-2 statements for the beneficiary for other relevant years, including 2001, 2002, and 2003. The petitioner offered no explanation for this deficiency. We further note, however, that the record contains the beneficiary's 2003 federal tax return, which shows wages earned in the amount of $20,800. The only W-2 statement attached to that return evidences wages paid by a different entity to the beneficiary's husband, so that the wages reported on the tax return only reflect reported income for her spouse. Similarly, the beneficiary's 2002 return reflects only W-2 wages paid to the beneficiary's husband by another

entity. The 2002 and 2003 federal returns, therefore, do not reflect that the petitioner paid the beneficiary any wages in those years, and fails to evidence her employment. The beneficiary's 1999 return lists no wages paid, and only $3,020 in adjusted gross income. The 1999 return does not contain a W-2 statement, and lists the beneficiary as an "outside travel agent." Accordingly, the petitioner's employment of the beneficiary is not documented in any wage payments for the years 1999, 2002, and 2003.[17] *See Matter of Ho*, 19 I&N Dec. at 591.

Additionally, the petitioner states that it considered the requirements to be two years of experience as a travel agent *and* two years of experience as a travel agency manager. It is unclear that the beneficiary has the required two years of experience as a travel agency manager.

Based on the foregoing, the petitioner has failed to adequately document that the beneficiary has the required experience. The petitioner must account for the foregoing inconsistencies in any further proceedings.

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 Motion to Reopen is granted. The director's decision is affirmed.

[17] We note that the petitioner did submit a copy of a travel agent card dated "thru 2001" [date of issue unclear] listing the beneficiary's affiliation with the petitioner.