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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 07 2010

SRC-07-156-52098

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 concerning your case 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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition certified his decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The petition is denied.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a stone mason supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petition was not supported with a valid labor certification and denied the petition accordingly. The director subsequently certified his decision to the AAO.[1]

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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on April 25, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker. As required by statute, a Form ETA 750 approved by the DOL is accompanied the petition. The Form ETA 750 was accepted on September 15, 2004 and certified on December 27, 2006 initially on behalf of the original beneficiary.[2] The instant petition is for a substituted beneficiary. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an

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[1] The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv). Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.). Authority to invalidate labor certifications is delegated to U.S. Citizenship and Immigration Services (USCIS) by DHS Delegation Number 0150.1(X), *supra*. Since the director invalidated the labor certification, the petition was no longer supported by a labor certification from the Department of Labor. Consequently, this office would typically lack jurisdiction to consider an appeal from the director's decision. Since this is a certification, however, the AAO will review the substantive issues of the director's decision. *See* 8 C.F.R. § 103.4.

[2] The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. USCIS records show that the petitioner filed an I-140 immigrant petition on behalf of the original beneficiary based on the instant labor certification and the petition was denied.

interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28 -96a.pdf (March 7, 1996).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3] On certification, counsel submitted a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on certification. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In this case, the underlying Form ETA 750 indicates that there are no education, training or experience requirements for the proffered position. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels U.S. Citizenship and Immigration Services (USCIS) to re-adjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. 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). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

On certification, counsel asserts that the failure to properly include the requisite experience on the Form ETA 750A should not be held against the petitioner and it is merely a question of excusable neglect on the part of the DOL. However, counsel did not submit any documentary evidence showing that the petitioner included or requested DOL include the experience requirement onto the Form ETA 750A at any stage of labor certification processing. The record does not contain any evidence that the DOL was in error in not including any requirements for the proffered position on the Form ETA 750A. 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.

Counsel also argues that the proffered position is assigned with O*Net 47-1011.01 in Job Zone 4 with an SVP Range of 7<8, therefore, it should be considered a skilled worker position despite the Form ETA 750 does not indicate any requirements. This office accessed the O*Net online site and found that the job 47-1011.00 – First-Line Supervisors/Managers of Construction Trade and Extraction Workers is assigned Job Zone Three with a SVP Range 6.0 to < 7.0. *See* http://online.onetcenter.org/link/details/47-1011.00 (accessed on March 19, 2010). Therefore, the proffered position can be either unskilled worker or skilled worker based on the employer's requirement. Counsel's assertion that the proffered position is assigned as a skilled worker by the DOL is misplaced and without support by O*Net.

On November 1, 2007, the director issued a notice of intent to deny (NOID) informing the petitioner of this defect and suggesting withdrawal of the petition or requesting that the classification sought be changed to a EW3 preference-other worker. In response to the director's NOID, counsel in his letter dated November 27, 2007 requested that substitution of the beneficiary on another certified ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089) on behalf of the same original beneficiary. In the brief submitted on certification, counsel asserts that ETA Form 9089 should be allowed to substitute. However, as previously discussed, while DOL's final rule allowed the substitution of alien beneficiaries on Form ETA 750 and resulting certifications according to Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, before July 16, 2007, the current DOL PERM regulations, effective on March 28, 2005 (*See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004)) do not permit the substitution of alien beneficiaries on ETA Form 9089 and resulting certifications. Moreover, the request for substitution of the instant beneficiary on the ETA Form 9089 in the instant case was submitted on November 27, 2007, more than four months after the DOL's final rule of

prohibiting the substitution went into effective on July 16, 2007. Therefore, the request of substitution of the beneficiary on the underlying ETA Form 9089 in this case cannot be accepted.

In addition, the labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(b)(2) provides: "An approved permanent labor certification *granted before July 16, 2007 expires* if not filed in support of a Form I–140 petition with the Department of Homeland Security *within 180 calendar days of July 16, 2007.*" (Emphasis added). The underlying ETA Form 9089 was certified on August 1, 2005 with 180 day validation period until February 1, 2006. The petitioner must file an I-140 petition using the ETA Form 9089 before February 1, 2006. The request of the substitution was submitted on November 27, 2007 by that time the underlying ETA Form 9089 had already expired. The underlying ETA Form 9089 was not valid to substitute at the time the petitioner requested the substitution. USCIS records also show that the I-140 petition (SRC-06-100-50433) by the instant petitioner on behalf of the original beneficiary based on the underlying ETA Form 9089 was filed on February 8, 2006 with Texas Service Center. The petition was approved in error because at the time of the filing, the ETA Form 9089 was expired and thus was not valid to support the immigrant petition. Therefore, the ETA Form 9089 was invalid even before the petition SRC-06-100-50433 was filed.

The evidence submitted does not establish that the petition is supported by a valid labor certification for classification as a skilled worker and thus, is not approvable. The AAO concurs with the director's determinations and the director's decision on January 17, 2008 must be affirmed.

Beyond the director's decision and counsel's assertions on certification, the AAO has identified an additional ground of ineligibility. 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 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.

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 was accepted for processing by any office within the employment system of the 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 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).

The original Form ETA 750 was accepted on September 15, 2004. The proffered wage as stated on the Form ETA 750 is $25.00 per hour ($52,000 per year based on working 40 hours per week). The petitioner claimed to have been established on February 10, 2000, to have a gross annual income of $2,977,211, to have a net annual income of $90,715 and to currently employ six workers. The beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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).

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.

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[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." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the

petitioner's current assets and current liabilities.[4] 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 evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. The petitioner's tax returns in the record demonstrate its net income and net current assets for 2004 through 2007, as shown in the table below.

- In 2004, the Form 1120S stated net income[5] of $60,938 and net current assets of $105,446.
- In 2005, the Form 1120S stated net income of $89,200 and net current assets of $103,296.
- In 2006, the Form 1120S stated net income of $136,738 and net current assets of $113,230.
- In 2007, the Form 1120S stated net income of $65,279 and net current assets of $117,171.

Therefore, for the years 2004 through 2007, it appears that the petitioner had sufficient net income or net current assets to pay the instant beneficiary the proffered wage.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] 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 (2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

In the instant case, the petitioner has filed additional Immigrant Petitions for Alien Worker (Form I-140) and four of them were approved.[6] Therefore, the petitioner would need to demonstrate its ability to pay two proffered wages in 2004, four in 2005, five in 2006 and four in 2007 each including the instant beneficiary.

The record does not contain any documentary evidence showing that the petitioner paid any compensation to these beneficiaries of the approved petitions. The petitioner must demonstrate that it had sufficient net income or net current assets to pay all the beneficiaries the proffered wages in the relevant years. As previously discussed, the petitioner had net current assets of $105,446 in 2004 which were sufficient to pay two proffered wages[7] the petitioner was obligated to pay that year; the petitioner's net current assets of $103,296 in 2005 were insufficient to pay four proffered wages; in 2006 the petitioner had net income of $136,738 which was insufficient to pay five proffered wages; and the 2007 net current assets of $117,171 were insufficient to pay four proffered wages. Therefore, the petitioner failed to establish its ability to pay all proffered wages in 2005 through 2007 through an examination of wages paid to the beneficiaries, or its net income or net current assets. The record does not contain any regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wages in 2008 onwards.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiaries the proffered wages as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the

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[6] USCIS records show that the petitioner has four approved Form I-140 immigrant petitions in addition to the instant pending petition. The detailed information about these approved immigrant petitions is as follows:

-- SRC-06-185-51835 filed on May 24, 2006 with the priority date of August 5, 2005, and approved on September 29, 2006.
-- LIN-07-015-52982 filed on October 19, 2006 with the priority date of October 6, 2003, and approved on October 17, 2007.
-- SRC-07-025-51714 filed on November 3, 2006 with the priority date of July 10, 2006, and approved on April 24, 2007.
-- SRC-07-112-51975 filed on February 26, 2007 with the priority date of November 22, 2005, and approved on August 10, 2007.

[7] The AAO assumes that proffered wages in those approved petitions are identical to the one in the instant case based on the fact that all of them are offered the same proffered position and the confirmation from counsel quoted in n. 7, *supra.*

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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to employ six workers. Given the record as a whole, the petitioner's history of filing petitions and the fact that the number of immigrant petitions reflects an increase of more than eighty percent (80%) of the petitioner's workforce, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

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).

In the instant case, the Form ETA 750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of Middle Eastern style cook. The applicant must have two years of experience in the job offered or in the related occupation of cook, the duties of which are delineated at Item 13 of the Form ETA 750A as follows: Season, prepare and cook meat, poultry, seafood, soups, and sauces in the Middle Eastern style cuisine. Item 15 of Form ETA 750A does not reflect any special requirements.

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.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The petitioner submitted a letter dated June 11, 2004 from [redacted] in Seoul Korea as evidence of the beneficiary's qualification to support the petition for a skilled worker. However, this office finds there are inconsistencies between the letter and the beneficiary's statements on her Form G-325A. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The record does not contain such independent objective evidence to resolve these inconsistencies. The contents of the letter cannot be supported by public records in Korea and the beneficiary's former employer cannot be verified by an investigation conducted by the U.S. Embassy. The record does not contain any documentary evidence to establish the employer's existence and the beneficiary's employment, such as the company's registration, taxation, personnel record, and the beneficiary's payroll or tax records. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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. at 582. Because of these defects, [redacted]'s letter will be given little weight in these proceedings. Therefore, the petitioner failed to establish the beneficiary's qualifications for the proffered position with regulatory-prescribed evidence as the petitioner claimed if even the petitioner had approved the petition had a valid labor certification for a skilled worker.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision is affirmed. The petition is denied.