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

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PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 07 151 51671 Office: TEXAS SERVICE CENTER Date: APR 2 1 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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).

Perry Rhew
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 appeal. The appeal will be dismissed.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a software consultant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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.

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 June 27, 2007 denial, 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.

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 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).

Here, the Form ETA 750 was accepted on November 3, 2004. The proffered wage as stated on the Form ETA 750 is $74,000.00 per year.

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.[1]

On the petition, the petitioner claimed to have been established in 1998 and to currently employ 220 workers. On the Form ETA 750B, which was signed by the beneficiary on October 22, 2004, the beneficiary claimed to have worked for the petitioner since June, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application 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, United States 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 (Reg. Comm. 1967).

As noted by the director, USCIS electronic records show that the petitioner filed numerous other I-140 petitions which have been pending during the time period relevant to the instant petition. 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 offer to each beneficiary is 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 Matter 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 Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record contains copies of the Forms W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner for the years 2004, 2005, and 2006. The Forms W-2 show that the petitioner paid the beneficiary less than the proffered wage in each year. Specifically, the beneficiary was paid $28,303.09 in 2004, $54,430.00 in 2005, and $52,105.84 in 2006.

On appeal, counsel has provided a list of beneficiaries on whose behalf the petitioner has filed Form I-140 petitions. The list includes the name of each beneficiary along with the "current salary" and proffered wage for each beneficiary. Counsel states that the total wages paid to all beneficiaries exceeds the proffered wage and, therefore, the petitioner has established its ability to pay the proffered wage.

However, the information that counsel provided in the list is inconsistent with the information contained in the Forms W-2 which are included in the record. Specifically, for nearly all beneficiaries, the "current salary" listed by counsel does not match the amount listed on the Forms W-2. Having reviewed the Forms W-2 in the record, it appears that the petitioner paid its beneficiaries less than the proffered wage in 2004, 2005 and 2006.

For 2004, the total proffered wages equaled $2,346,076.00.[2] According to the Forms W-2 for 2004, the total wages paid to beneficiaries in 2004 by the petitioner was $1,301,010.36.[3] The difference between the proffered wages and wages actually paid is $1,063,722.92.[4] In addition, there were four beneficiaries on the list provided by counsel who had priority dates in 2004 or earlier, but for whom no Form W-2 was provided. The petitioner has not established that it paid any wages to these beneficiaries in 2004. The petitioner must establish its ability to pay the entire proffered wage for these individuals, which is $365,000.[5] Therefore, for 2004, the petitioner must establish its ability to pay a total of $ 1,428,722.92, which includes the difference between the proffered wages and

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[2] This figure is the sum of the proffered wages listed by counsel for beneficiaries whose petitions had a priority date in 2004 or prior.

[3] This figure is the sum of wages listed on the Forms W-2 for beneficiaries whose petitions were filed in 2004 or prior.

[4] For purposes of this calculation, where the wages actually paid to a beneficiary exceeded the proffered wage, the difference between the proffered wage and the wages actually paid to the beneficiary were considered to be zero. That is, the excess of the wages actually paid over the proffered wage was not considered in the final calculation. This is because wages already paid to others are not considered to be available to prove the ability to pay the wage proffered to other beneficiaries.

[5] For two of these individuals, [redacted] and [redacted] counsel states that these individuals are no longer employed by the petitioner. However, no evidence has been provided to indicate when these individuals were terminated, nor has evidence been submitted to establish that the Form I-140 petitions filed on behalf of these individuals have been withdrawn. Therefore, the petitioner is still obligated to establish its ability to pay the proffered wage for these individuals.

amounts listed on the Forms W-2 as well as the entire proffered wage for those beneficiaries for whom no W-2 was submitted.

For 2005, the total proffered wages equaled $3,875,923.00.[6] According to the Forms W-2 for 2005, the total wages paid to the beneficiaries in 2005 by the petitioner was $ 2,813,456.60.[7] The difference between the proffered wages and wages actually paid is $1,132,402.41.[8] In addition, there were four beneficiaries on the list provided by counsel who had priority dates in 2005 or earlier, but for whom no Form W-2 was provided. The petitioner has not established that it paid any wages to these beneficiaries in 2005. As noted for the 2004 calculation, the petitioner must establish its ability to pay the entire proffered wage for these individuals, which is $365,000.[9] Therefore, for 2005, the petitioner must establish its ability to pay a total of $1,497,402.41, which includes the difference between the proffered wages and amounts listed on the Forms W-2 as well as the entire proffered wage for those beneficiaries for whom no W-2 was submitted.

For 2006, the total proffered wages equaled $4,923,141.00.[10] According to the Forms W-2 for 2006, the total wages paid to beneficiaries in 2006 by the petitioner was $4,192,816.08.[11] The difference between the proffered wages and wages actually paid is $971,551.32.[12] In addition, there were three beneficiaries on the list provided by counsel who had priority dates in 2006 or earlier, but for whom no Form W-2 was provided. The petitioner has not established that it paid any wages to these beneficiaries in 2006. The petitioner must establish its ability to pay the entire proffered wage for these individuals, which is $273,000.[13] Therefore, for 2006, the petitioner must establish its ability to pay a total of $1,244,551.32, which includes the difference between the proffered wages and amounts listed on the Forms W-2 as well as the entire proffered wage for those beneficiaries for whom no W-2 was submitted.

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.

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[6] This figure is the sum of the proffered wages listed by counsel for beneficiaries whose petitions had a priority date in 2005 or prior.
[7] This figure is the sum of wages listed on the Forms W-2 for beneficiaries whose petitions were filed in 2005 or prior.
[8] See footnote 4, *supra*.
[9] See footnote 5, *supra*.
[10] This figure is the sum of the proffered wages listed by counsel for beneficiaries whose petitions had a priority date in 2006 or prior.
[11] This figure is the sum of wages listed on the Forms W-2 for beneficiaries whose petitions were filed in 2006 or prior.
[12] See footnote 4, *supra*.
[13] See footnote 5, *supra*.

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 USCIS 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.
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> 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2004, 2005 and 2006, as shown in the table below.

- In 2004, the Form 1120 stated net income of $41,208.00.
- In 2005, the Form 1120 stated net income of $118,767.00.

- In 2006, the Form 1120 stated net income of $161,590.00.[14]

The petitioner did not have sufficient net income to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2004. Although the petitioner's net income exceeded the proffered wage for the instant petition in 2005 and 2006, as noted above, the petitioner has filed multiple petitions. The petitioner's net income in 2005 and 2006 was insufficient to pay the difference between the proffered wages and wages actually paid to all beneficiaries.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary (or beneficiaries of multiple, simultaneously pending petitions) during the period, if any, do not equal the amount of the proffered wages or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[15] 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 tax returns demonstrate its end-of-year net current assets for 2004, 2005 and 2006 as shown in the table below.

- In 2004, the Form 1120 stated net current assets of $567,572.00.
- In 2005, the Form 1120 stated net current assets of $1,709,380.00.
- In 2006, the Form 1120S stated net current assets of $1,498,844.00.

Although the petitioner's net current assets exceeded the proffered wage for the instant petition in 2004, as noted above, the petitioner has filed multiple petitions. The petitioner's net current assets in 2004 were insufficient to pay the difference between the proffered wages and wages actually paid to all beneficiaries.

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[14] In 2006, the petitioner filed Form 1120S, U.S. Income Tax Return for an S Corporation. 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 18 of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed April 20, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its tax return.

[15] 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.

For the years 2005 and 2006, the petitioner did have sufficient net current assets to pay the difference between the proffered wages and wages actually paid to the beneficiaries listed by counsel. However, USCIS records show that the petitioner filed several additional Form I-140 petitions during the relevant period which were not listed by counsel on appeal.[16] No Forms W-2 have been provided for these beneficiaries, nor has counsel indicated the proffered wage for these individuals. Because this information has not been provided, this office finds that the petitioner has failed to establish that it had sufficient net current assets to pay the difference between the proffered wages and wages actually paid to all beneficiaries in 2005 and 2006 as well. The burden of proof in these proceedings rests solely on the petitioner. Section 291 of the Act, 8 U.S.C. §1361.

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 beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, net income or net current assets.

On appeal, counsel asserts that the director erred in not considering the balance in the petitioner's business checking account. However, counsel's reliance on the balance in the petitioner's bank account 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 that was considered above in determining the petitioner's net current assets.

Counsel also states that the director erred in not considering that the petitioner had an available line of credit. However, 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

[16] Specifically, USCIS records show that the petitioner filed several petitions in late June and early July 2007, prior to filing the instant appeal. Several of these petitions had priority dates in 2004 or 2005. The receipt numbers for these petitions include the following: SRC0721051838, SRC0721051791, SRC0721051564, SRC0721051460, LIN0720053738, LIN0720053698, SRC0721152912, SRC0721151183, SRC0721151111, and LIN0719950393.

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).

It is noted that the record contains a letter from of the petitioner, dated April 12, 2007, indicating that the petitioner employs 220 people. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." The record does not establish that [redacted] is a financial officer of the petitioner. Additionally, given the record as a whole and the petitioner's history of filing numerous petitions, we find that USCIS need not exercise its discretion to accept the letter from [redacted] or a financial officer of the petitioner.

In addition to the above analysis, 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. 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. 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 this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. As discussed above, the petitioner in this case has filed numerous petitions. This detracts from the fact that the petitioner showed significant gross receipts during the period 2004 to 2006. Further, the petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. 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 wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, it is noted that there is an inconsistency in the record with respect to the beneficiary's credentials. Therefore, the petitioner has not established that the beneficiary is qualified for the position. 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. *See Matter of Wing's Tea House*, 16 I&N Dec. 158.

The Form ETA 750B states that the beneficiary received a Bachelor of Commerce degree from St. Xavier's College in Calcutta, India in July, 1998. However, the copy of the beneficiary's Bachelor of Commerce degree in the record appears to have been issued by the University of Calcutta. This inconsistency seriously undermines the credibility of the evidence, and thus it cannot be concluded that the beneficiary has earned the degree required by the terms of the labor certification. 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. 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).

Accordingly, the petition shall be denied for this additional reason. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.