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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 17 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is [redacted] franchise. It seeks to permanently employ the beneficiary in the United States as a "first line supervisor/manager of retail sales workers." The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 30, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's February 8, 2008 denial, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also consider whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.[2]

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

> *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.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date.

The proffered wage stated on the labor certification is $15.23 per hour ($31,678.40 per year). On the petition, the petitioner claimed to have been established in 1984, to have a gross annual income of over $500,000.00, and to employ 9 workers. According to the tax returns in the record, the petitioner (EIN 20-2174552) has been structured as an S corporation since 2005 with a fiscal year based on a calendar year. The [redacted] website states that the petitioner was incorporated on January 14, 2005. [redacted] Prior to 2005, the evidence in the record indicates that the owner of the petitioner operated the 7-Eleven store at the same address as a sole proprietorship ([redacted]).

The labor certification was originally filed by the sole proprietorship on April 30, 2001 using Form ETA 750, Application for Alien Employment Certification. After March 28, 2005, employers were required to file labor certification applications using ETA Form 9089. *See* 69 Fed. Reg. 77325 (Dec. 27, 2004)(hereinafter "PERM regulations"). The PERM regulations permitted employers with pending Forms ETA 750 to convert their labor certification applications to ETA Forms 9089 for processing under the new PERM program. 20 C.F.R. § 656.17(d). The petitioner requested the conversion of a labor certification filed by the sole proprietorship. DOL regulations require the conversion to be submitted by the same employer that filed the Form ETA 750. 20 C.F.R. § 656.17(d)(4). In approving the conversion, the DOL concluded that the petitioner was the same employer as the sole proprietorship, and therefore the petitioner is now the sponsoring employer on the certified ETA Form 9089.

In the instant case, when performing the analysis of the petitioner's ability to pay the proffered wage, the AAO will consider the petitioner to be a successor-in-interest to the sole proprietor that originally filed the Form ETA 750 on behalf of the beneficiary on April 30, 2001. In order for a successor-in-interest to establish its ability to pay the proffered wage, the petitioner must submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. §

204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481, 482 (Comm. 1981). The successor must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. *Id.* As is stated above, the petitioner was formed in January 2005. Accordingly, this analysis will initially address the petitioner's ability to pay the proffered wage for 2005 and 2006, and then it will address the predecessor sole proprietorship's ability to pay the proffered wage for 2001, 2002, 2003, and 2004.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary did not claim to have worked for the petitioner or the sole proprietor. The record of proceeding contains no evidence that the petitioner or the sole proprietor has employed the beneficiary. Accordingly, the petitioner has not established that it paid the beneficiary an amount equal to or greater than the proffered wage.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). The petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage. 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. 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 wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner's total payroll exceeded 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. 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.[4] If

[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.

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 net income for the required period, as shown in the table below.[5]

Year	Net Income ($)
2005	73,545.00
2006	35,745.00

Therefore, for the years 2005 and 2006, the petitioner possessed sufficient net income to pay the proffered wage. Accordingly, it is not necessary to review the petitioner's net current assets for 2005 and 2006.

Next is the analysis of the predecessor sole proprietorship's net income and net current assets. Unlike an S corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (IRS Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).[6]

In the instant case, the sole proprietor's tax returns state that he supports himself and a dependent parent. The sole proprietorship's adjusted gross income is as follows:

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[5] The petitioner filed its tax returns using Form 1120S, U.S. Income Tax Return for an S Corporation. For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 18 (2006 to present) or Line 17e (2005). When the two numbers differ, the number reported on Schedule K is used for net income.

[6] In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately $20,000 where the beneficiary's proposed salary was $6,000 (or approximately thirty percent of the petitioner's gross income).

Year	Net Income ($)
2001	45,428.00
2002	55,881.00
2003	57,065.00
2004	61,596.00

It is improbable that the sole proprietor could support himself and his parent on less than $30,000 for an entire year, which is what remains after reducing the adjusted gross income for each year by the amount required to pay the proffered wage. The improbability of the sole proprietor being able to pay the proffered wage is exemplified by his Schedules A. In 2002, 2003 and 2004, the petitioner reported significant home mortgage interest expenses reducing his adjusted gross income to under $10,000.00 in each of those years when also subtracting the proffered wage. It is not credible that that the petitioner could have employed the beneficiary, paid the one expense of mortgage interest, and paid all other reasonable household expenses in 2002, 2003 and 2004, as less than $10,000 in income would have been available in each of those years. Further, the sole proprietor's individual tax returns do not contain financial data that would permit an analysis of net current assets.

Accordingly, the AAO will consider whether the evidence in the record establishes that the sole proprietor possessed sufficient assets to pay the proffered wage when balanced by his expenses.

The record contains the following bank account statements for the sole proprietor:

- Bank account statement for May 8, 2001 to June 6, 2001 showing a checking account balance of $3,368.65 and a savings account balance of $375.45.
- Bank account statement for June 6, 2002 to July 8, 2002 showing a checking account balance of $2,142.58.
- Bank account statement for July 9, 2002 to August 8, 2002 showing a checking account balance of $1,770.37.
- Bank account statement for September 6, 2002 to October 7, 2002 showing a checking account balance of $1,024.20.
- Bank account statement for March 9, 2004 to April 7, 2004, showing a checking account balance of $3,384.71.
- Bank account statement for April 8, 2003 to May 6, 2003 showing a checking account balance of $3,296.20.
- Bank account statement for October 8, 2003 to November 3, 2003 showing a checking account balance of $285.54.
- Bank account statement for November 4, 2003 to December 5, 2003 showing a checking account balance of $4,190.82.
- Bank account statement for December 6, 2003 to January 6, 2004, showing a checking account balance of $4,518.11.
- Bank account statement for June 8, 2005 to July 6, 2005, showing a checking account balance of $388.06.
- Bank account statement for January 1, 2008 through January 31, 2008, showing a savings account balance of $75.15 and a checking account balance of $403.35.

These incomplete bank account statements show that the sole proprietor maintained low bank account balances, and do not establish that he had additional funds available in his bank account to pay the beneficiary's salary. If the record contains a small number of bank account statements from different periods of time, they only show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. The bank statements do not identify funds that may have been already obligated for other purposes. In addition, 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 sole proprietor's taxable income.

The record also contains a Document Title Declaration of Homestead, which indicates that the sole proprietor owns a home in [redacted]. It appears the home was purchased on April 1, 2002, which is after the April 30 priority date. The record contains an assessment of the property at $324,500.00 in a notice dated December 1, 2002. However, there is no evidence in the record of the mortgage principal that the sole proprietor owed on the house.

The record also contains an unsigned Home Equity Line of Credit Deed of Trust dated July 26, 2006. There is no evidence that this home equity line was ever executed. Further, USCIS will not augment the petitioner's net income or net current assets by adding in the value of a home equity line. Such lines of credit are a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. It is not a contractual or legal obligation on the part of the bank. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. *See* Barron's Dictionary of Finance and Investment Terms, 45 (1998). In addition, USCIS will only consider the personal assets of the sole proprietor until the formation of the S corporation in January 2005. The Home Equity Line of Credit Deed of Trust is dated after the petitioner was formed.

Therefore, the petitioner has not submitted evidence establishing that he had personal assets available to pay the proffered wage from the priority date until the petitioner was formed.

Finally, the sole proprietor failed to provide an itemized list of his household expenses from the priority date. The director issued a Request for Evidence (RFE) on November 20, 2007 requesting that the petitioner submit a list of the sole proprietor's monthly recurring household expenses from the priority date through the end of 2004. The director's decision notes that the petitioner failed to provide this evidence. Counsel also failed to provide this evidence on appeal. Therefore, without a detailed accounting of the sole proprietor's ability to sustain himself and any dependents while also paying an additional salary, it cannot be concluded that the petitioner established that the predecessor possessed the ability to pay the proffered wage from the April 30, 2001 priority date until January 14, 2005. Also, as noted *supra*, considering the mortgage interest obligation alone, it is not credible that the beneficiary could have supported himself, his dependent, and the beneficiary's wages in those years.

In addition to the preceding 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 (Reg. Comm'r 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 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.

The record contains payroll reports purportedly generated by [redacted]., indicating a total payroll of $171,482.68 in 2001, $198,317.66 in 2002, $209,721.69 in 2003 and $203,058.64 in 2004. The record also contains profit and loss statements generated by [redacted]. for the sole proprietorship covering the years ending December 2000, December 2001, December 2002, December 2003 and December 2004. The statements indicate that the store had total sales of $1.2 million in 2001, $1.3 million in 2002, $1.3 million on 2003, and $1.3 million in 2004.[7] A letter of [redacted] Field Consultant of [redacted]. dated March 4, 2008 states that [redacted] the franchisor, "retains all accounting functions pertaining to the franchised store including yearly internal audits for profits and losses and payroll" and that the reports are based on the accounting conducted by [redacted] Further, the letter states that the payroll expenses on the sole proprietor's tax returns resulted from [redacted] Inc.'s independent accounting of the store's

[7] There are also two profit and loss statements for the petitioner generated by [redacted]. for 2005 and 2006. The financial data, and what appear to be store numbers, differ on each statement. Since there is no explanation in the record of these differing statements, they will not be considered here. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

payroll.[8]

It is noted that the store has been in business for many years, and has annual sales of over $1 million. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service. In fact, the submitted individual federal tax returns and bank account statements paint a clear picture that, from April 30, 2001 until January 14, 2005, the predecessor sole proprietorship did not have the ability to pay the beneficiary's proffered wage in addition to supporting himself and his dependent.

Thus, assessing the totality of the circumstances in this case, it is concluded that 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, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to

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[8] If the petitioner relies on financial statements to demonstrate ability to pay, the financial statements must be audited. 8 C.F.R. § 204.5(g)(2). Contrary to counsel's assertion on appeal, the profit and loss statements generated by [redacted] are not audited financial statements. Audited financial statements are the highest level of service a Certified Public Accountant (CPA) provides. Audited financial statements contain a report from the CPA stating the audit was performed in accordance with Generally Accepted Auditing Standards, and provides reasonable assurance that the financial statements are free of material misstatement. The CPA also provides an opinion, or disclaimer of opinion, as to whether the financial statements are presented in accordance with Generally Accepted Accounting Principles.

In the instant case, the submitted profit and loss statements appear to have been internally generated by the franchisor, [redacted] In appropriate cases, USCIS has the discretion to consider additional evidence of the petitioner's ability to pay the proffered wage, including, but not limited to, unaudited profit and loss statements which have been submitted in addition to the required annual reports, federal tax returns, or audited financial statements. 8 CFR § 204.5(g)(2). Even if the AAO accepted the data on the unaudited statements, they still do not establish the predecessor sole proprietor's ability to pay the proffered wage. Further, the letter from [redacted] states that the sole proprietor's tax returns incorporated the data from the profit and loss statements, therefore it is unclear what additional value they provide to the petitioner's tax returns.

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, Madany* 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. *Coorney,* 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith,* 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff,* 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

H.4. Education: None required.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months required.
H.7. Alternate field of study: Not accepted.
H.8. Alternate combination of education and experience: Not accepted.
H.9. Foreign educational equivalent: Not accepted.
H.10. Experience in an alternate occupation: Not accepted.
H.11. Job Duties: Oversee convenience store; prepare work schedules, operate cash register and credit card purchases, sell groceries and gasoline, maintain inventory and equipment; be responsible for ordering and purchasing; reconcile all accounts; and prepare daily sales reports.
H.14. Specific skills or other requirements: None.

Therefore, the petitioner must establish that the beneficiary has two years of experience in the offered position of "first line supervisor/manager of retail sales workers."

Any experience requirements for skilled workers must be supported by letters from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien. 8 C.F.R. § 204.5(l)(3)(ii)(B).

On the labor certification, the beneficiary claims to have worked for [redacted] as a Manager and Operator from December 1, 2000 to June 30, 2004 for 40 hours per week; at Neighborhood [redacted] as a Manager and Operator from July 1, 2003 to November 30, 2005 for 40 hours per week, and at [redacted] as an owner from June 2004 to August 2006 for 40 hours per week. Furthermore, the priority date is April 30, 2001. As noted above, all necessary experience (i.e., two years experience in the job offered) must have been attained by that date. In this matter, the beneficiary had attained only five months of experience by the priority date. Accordingly, he is not qualified for the position. It is noted that the beneficiary's claimed periods of employment for all three full-time positions overlap. The beneficiary claims on the labor certification that he worked 120 hours per week in June 2004 in three separate jobs each located approximately 30 miles apart from the other in the [redacted] metropolitan area.

The record contains two letters attesting to the beneficiary's experience in the offered position:

- Letter of [redacted], dated July 24, 2005. The author claims to have been manager of [redacted], a store purportedly owned by the beneficiary from December 2000 to June 2004. The author also claims to have been manager of "[redacted]" that the beneficiary also purportedly owned from July 2003 to November 2005. The letter states that the author was with the beneficiary in the store on a daily basis and that the beneficiary was "involved as an active owner completing inventory, merchandise selections, using and maintaining store and office machines and equipment, ordering of merchandise and services, actively participating in the preparation of tax returns and payroll as well as serving customers."

- Undated letter of [redacted]. The letter states that [redacted] was a regular customer at [redacted] which was owned and operated by the beneficiary. The letter states: "[d]uring my daily visits to the store, I observed [the beneficiary] actively involved in the store operations such as maintaining the inventory, selecting and ordering of merchandise serving the customers, while using and maintaining the store and office machines and equipment."

The letter of [redacted] is not from an employer and it is not on letterhead. It does not state the hours the beneficiary worked per week. [redacted] describes himself as manager and the beneficiary as owner of [redacted] and [redacted]. However, on the labor certification, the beneficiary describes himself as a manager and not an owner. The letter is dated July 24, 2005, but purports to attest to the beneficiary's employment experience through November 2005. The letter does not explain the over one year in overlap between the employment at the two stores.

The letter of Mr. [redacted] is not from an employer and it is not on letterhead. It does not state the hours or dates that the beneficiary worked at [redacted]. It is also not plausible that the author visited the store every day as he claims.

Therefore, because of the inconsistencies explained above, the submitted employment experience letters are not acceptable evidence of the beneficiary's purported employment experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective

evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

Thus, the petitioner has not established that the beneficiary possesses the experience required to perform the proffered position. 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)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.