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

[redacted]

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DATE: DEC 0 6 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a custom woodworker. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 August 20, 2010 denial, the 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 ETA Form 9089 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 ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on December 10, 2008. The proffered wage as stated on the ETA Form 9089 is $48,922.00 per year. The ETA Form 9089 states that the position requires 24 months of experience in the job offered, or 24 months of experience as a carpenter.[1]

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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[1] Part H.14 of the ETA Form 9089 lists the following specific skills or other requirements:

1. Assemble or fasten materials to make framework or props.
2. Attach or bolt parts, components, or subassemblies to assembly units.
3. Build door frames.
4. Build rough wooden structures.
5. Build wood stairways.
6. Build, erect or dismantle scaffolds or other temporary structures.
7. Construct, erect, install or repair wood structures.
8. Estimate amount of lumber or material required.
9. Install floor trim.
10. Install, build or repair cabinets.
11. Install, build or repair floors.
12. Install, build or repair windows.
13. Saw lumber or wood.
14. Assemble wooden parts.
15. Cut and shape lumber to specified shape.
16. Mark layout on wooden stock.
17. Operate planer, wood shaper, power saw, jointer, router, sander, molder, or lathe.
18. Wax and polish model.
19. Assemble wood products.
20. Create wood stock layout.
21. Engage in wood sanding.
22. Follow, interpret, or read blueprints or schematics.
23. Laminate wood.
24. Monitor production in job shop.
25. Operate wood shaper, lathes.
26. Operate woodworking equipment.
27. Provide general labor.
28. Provide material handling.
29. Spray paint product.
30. Use power or hand tools.
31. Use woodworking techniques, machine, or equipment.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1989 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on October 19, 2009, the beneficiary claimed to have worked for the petitioner as of February 4, 2008.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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'l Comm'r 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'l Comm'r 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 paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2008 or subsequently. The petitioner did, however, submit W-2 Forms showing it paid the beneficiary wages as follows:

- 2008 - $33,338.75
- 2009 - $34,833.15[3]

Thus, for those years the petitioner must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary. Those amounts are:

- 2008 - $15,583.25
- 2009 - $14,088.85

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

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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).

[3] The beneficiary's pay stubs for 2010 state year-to-date earnings as of April 3, 2010 of $10,255.29.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that 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.
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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 118. "[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).

The record before the director closed on May 25, 2010 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2010 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2009 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2008 and 2009, as shown in the table below.

- In 2008, the Form 1120S stated net income[4] of $10,833.00.
- In 2009, the Form 1120S stated net income of ($114,102.00).

Therefore, for the years 2008 and 2009, the petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages paid to the beneficiary.

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.[5] 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 petitioner's tax returns demonstrate its end-of-year net current assets for 2008 and 2009, as shown in the table below.

- In 2008, the Form 1120S stated net current assets of ($29,512.00).
- In 2009, the Form 1120S stated net current assets of ($109,710.00).

Therefore, for the years 2008 and 2009, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary.

Therefore, from the date the ETA Form 9089 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, or its net income or net current assets.

Counsel asserts on appeal that gross income, not net income, should be used in determining whether the petitioner has the ability to pay the proffered wage. As stated above, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now

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[4] 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.

[5] 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.

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).

Further as noted above, "[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). *See also River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

Counsel also states that the petitioner's "financial documents, letters from its CFO and Certified Public Accountant" complied with 8 C.F.R. 204.5(g)(2) regarding a petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service. (Emphasis added.)

The record contains unaudited profit and loss statements for January through mid-October 2009 and for January through April 2010. Counsel's reliance on unaudited financial records is misplaced. The regulation cited above at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Furthermore, the petitioner is not an entity that employs 100 or more workers to be able to rely upon a statement from its financial officer regarding the ability to pay the proffered wage. As the record contains the petitioner's 2009 tax return, the petitioner's financial information for 2009 has been fully considered.

The record contains a letter from the petitioner's accountant that states the petitioner had the ability to pay the beneficiary's proffered wage for 2008 based on "gross profit, assets, credit and cash flow." In 2009, the accountant cites to the beneficiary's W-2 wages paid and again references gross sales and gross profits. As stated above, 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).

The petitioner's accountant states that the company has machinery and automobiles valued at $75,000 and other current assets that amount to $82,952. This letter does not state which year(s) these figures apply to or how they were obtained. Furthermore, assets such as machinery and automobiles are not readily liquefiable assets. Additionally, it is unclear that these assets could be liquidated and the business still retain its functionality. As shown above, according to Schedule L of the petitioner's tax returns for 2008 and 2009, the petitioner had negative net current assets and the petitioner's cash was considered within this analysis.[6]

Additionally, 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 petitioner'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* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).[7]

The petitioner's accountant also states that the petitioner implemented a business strategy in the third quarter of 2008 to establish an in-house marketing director and expand the petitioner's services to provide emergency response services for insurance companies and claim adjusters, which required additional investment in IT and communication upgrades. The record does not contain any evidence expanding on these claims regarding amounts spent and the resultant impact on the petitioner's tax returns. The petitioner's accountant states that the return from this investment was "evident with a substantial client base and successful response," but there is not any evidence of this and the letter is not dated to determine when the return on this investment occurred.

The record contains evidence of several vehicles in the name of the petitioner's owner. The director correctly concluded that these are not readily liquefiable assets to be considered toward the petitioner's ability to pay the proffered wage. Furthermore, these vehicles appear to be used in the petitioner's business as noted on the tax returns, thus diminishing the claim that these assets could potentially be used to pay the proffered wage.[8] The record also contains a letter from the petitioner's

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[6] As stated above, net current assets are the difference between the petitioner's current assets and current liabilities. 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.

[7] USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner'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'l Comm'r 1977).

[8] The record contains a car purchase agreement of one of these vehicles which lists the petitioner's

owner in which he asserts that the tax returns of [redacted] another company he owns, should be used in showing the petitioner's ability to pay the beneficiary's proffered wage because it subcontracts many of its projects to the petitioner. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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'l 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.

In the instant case, the petitioner states on the Form I-140 that it has been in business since 1989 and that it employs eight workers. For 2008, the petitioner's tax returns reflect low net income and negative net current assets. For 2009, the petitioner's tax returns reflect negative net income and

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owner jointly with his wife. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). If this is a personal asset, the petitioner may not rely on its use to show the petitioner's ability to pay the beneficiary's proffered wage. Alternatively, as noted above, if it is an asset of the business, it is not clear that it could be sold if it is used to support the petitioner's business.

negative net current assets. As stated above, the petitioner's accountant states that the petitioner implemented a business strategy in the third quarter of 2008 which required additional investment in IT and communication upgrades that were applied in 2009. However, the petitioner has not provided any evidence in the record to substantiate these claims or the actual amount of these costs. The petitioner has also not provided any evidence of its reputation in the industry, or evidence of its historical growth. The record only contains two tax returns from which the AAO is unable to extrapolate any historical growth patterns. 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 unclear that the petitioner will be the actual employer of the beneficiary. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3. 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).

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not definitively establish that the petitioner will be the beneficiary's actual employer. The petitioner stated on the Form I-140 that it had eight employees (as of March 1, 2010, the date the Form I-140 was signed). The ETA Form 9089 states that the petitioner has employed the beneficiary from February 4, 2008 to the October 19, 2009, the date of signature. The tax returns submitted by the petitioner do not state any amounts of salaries and wages paid to employees for 2008 and 2009. Other amounts are reported on these tax returns as costs of labor or as Schedule A subcontracting expenses. The petitioner submitted a letter which states, "My other company, [redacted] . . . subcontracts many of the projects to [the petitioner]." From the record, it is not clear that the petitioner intends to employ the beneficiary directly or whether he would be directly employed by [redacted] and subcontracted to the petitioner. The petitioner must address this issue in any further filings.

Additionally, 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)(1), (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 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. *Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, Part H.14. of the labor certification states that the offered position requires the following specific skills:

1. Assemble or fasten materials to make framework or props.
2. Attach or bolt parts, components, or subassemblies to assembly units.
3. Build door frames.
4. Build rough wooden structures.
5. Build wood stairways.
6. Build, erect or dismantle scaffolds or other temporary structures.
7. Construct, erect, install or repair wood structures.
8. Estimate amount of lumber or material required.
9. Install floor trim.
10. Install, build or repair cabinets.
11. Install, build or repair floors.
12. Install, build or repair windows.
13. Saw lumber or wood.
14. Assemble wooden parts.
15. Cut and shape lumber to specified shape.
16. Mark layout on wooden stock.
17. Operate planer, wood shaper, power saw, jointer, router, sander, molder, or lathe.
18. Wax and polish model.
19. Assemble wood products.
20. Create wood stock layout.
21. Engage in wood sanding.
22. Follow, interpret, or read blueprints or schematics.
23. Laminate wood.
24. Monitor production in job shop.
25. Operate wood shaper, lathes.
26. Operate woodworking equipment.
27. Provide general labor.
28. Provide material handling.

29. Spray paint product.
30. Use power or hand tools.
31. Use woodworking techniques, machine, or equipment.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a carpenter fo[redacted].

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter from [redacted]. that states the beneficiary gained many of the above-referenced skills in this employment. However, this letter does not state whether the beneficiary gained the following skills in this employment as required by the certified labor certification:

- Build door frames.
- Estimate amount of lumber or material required.
- Install floor trim.
- Install, build or repair windows.
- Operate wood shaper, power saw, jointer, router, sander, molder, or lathe.
- Wax and polish model.
- Create wood stock layout.
- Engage in wood sanding.
- Follow, interpret, or read blueprints or schematics.
- Laminate wood.
- Monitor production in job shop.
- Operate wood shaper, lathes.
- Provide general labor.
- Provide material handling.
- Spray paint product.
- Use power or hand tools.
- Use woodworking techniques, machine, or equipment.

The evidence in the record does not establish that the beneficiary possessed all the required skills in Part H.14. and therefore has not established that he had all the required experience set forth on the labor certification by the priority date.[9] Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the

[9] The petitioner should address this in any further filings.

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.