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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAR 2 2 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 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,

for
Perry Rhew
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 quick service restaurant. It seeks to employ the beneficiary permanently in the United States as a manager. 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 I-140 petition was submitted without all of the required initial evidence, specifically evidence of the beneficiary's experience and evidence of the petitioner's ability to pay the proffered wage. The director denied the petition accordingly.[1]

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 January 28, 2009 denial, the petitioner failed to submit initial evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage.

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]

The petitioner claims on appeal that that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

> *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence of its continuing ability to pay the proffered wage as of April 23, 2001, the priority date, as well as evidence that the beneficiary met

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[1] Mr. [redacted] is listed as the representative for the petitioner. The State Bar of California website shows that Mr. [redacted] is currently ineligible to practice law in California. *See* http://members.calbar.ca.gov/fal/Member/Detail/181372 (accessed March 16, 2012).

[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 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 requirements of Form ETA 750, and therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility.

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).

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner, , is a different entity from the employer listed on the labor certification, . A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The record of proceeding does not contain any evidence able to satisfy all three conditions described above. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

Beyond the decision of the director, the petitioner has failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

On appeal the petitioner submitted its Form W3 for 2008.[3] The petitioner also stated that for 2008 it issued over one hundred Forms W2s and, therefore, is exempt from providing its tax returns. The petitioner did not submit any other evidence of ability to pay.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[3] The Transmittal of Wage and Tax Statements (Form W3) is not a proper document to establish petitioner's ability to pay. Form W3 contains a summary of all the Form W2s submitted to the Social Security Administration (SSA). The amounts expressed on Form W3 should match the total of the employer's quarterly amounts reported on Form 941 during the year. *See* http://www.irs.gov/instructions/iw2w3/index.html (accessed February 27, 2012).

> *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. 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of 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, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

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

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is $13.50 per hour ($28,080.00 per year based on forty hours per week).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. The record does not contain any evidence that the petitioner employed the beneficiary and paid the beneficiary the full proffered wage each year since the priority date.

If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference

between the wage paid, if any, and the proffered wage.[4] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioner's failure to provide copies of its annual reports, federal tax returns, or audited financial statements for all years since the priority date (April 23, 2001) precludes USCIS from analyzing the petitioner's net income. As mentioned above, Form ETA 750 was filed by and the instant I-140 petition was filed by JTC Restaurants, Inc. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. *See* 8 C.F.R. § 204.5(g)(2) and *Matter of Dial Auto*, 19 I&N Dec. at 482.

Per regulations the director *may*, in its discretion, accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage in a case where the prospective United States employer employs 100 or more workers. On appeal, counsel claims that the petitioner issued more than one hundred Form W2s in 2008. Counsel submits Form W3 issued to the petitioner in 2008 to demonstrate its ability to pay the proffered wage. No evidence of the petitioner's ability to pay the proffered wage for any other year was submitted. This evidence is cannot be accepted to establish the petitioner's ability to pay the proffered wage. The petitioner did not submit a letter from its financial officer. It is noted that the petitioner did not complete Part 5 of Form I-140 specifically with respect of its "current number of employees." Further, even if the Form W3 were accepted, the form is issued to the petitioner, Inc., and not the employer listed on the labor certification,

Accordingly, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Beyond the decision of the director, the petitioner has also not demonstrated by credible evidence 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'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 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*

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[4] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm'r 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, the labor certification states that the offered position requires two years of experience in the job offered as a Manager/Food Store. On the labor certification, the beneficiary claimed to qualify for the offered position based on experience as a Manager/Food Store with: (i) located at from May 2000 to present; [5] (ii) located at from April 1999 to May 2000; and (iii) located at from October 1997 to April 1999.

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).

On appeal, the petitioner submitted a copy of a handwritten letter dated June 28, 2007, signed by in the capacity of "owner." This letter is on Subway's corporate letterhead and attests to the beneficiary's full-time previous employment as a store manager from May 12, 1999 to May 23, 2001. The footer of the letter contains four different addresses. The letter of record fails to specify in which of the four addresses listed on footer the beneficiary worked between May 12, 1999 and May 23, 2001. It is noted that the address for is the address listed on Form ETA 750 for where the beneficiary claimed to have worked from May 2000 to present.[6] Also, the address appears in the footer of the letter. This address relates to the address listed on the labor certification for Public Record information reveals that , is owned by is located at , and is a

Even though the period of employment mentioned in the letter (May 12, 1999 to May 23, 2001) covers the two years of experience required by the labor certification, the attestation to the beneficiary's work history contained in the June 28, 2007 letter of experience of record cannot be reconciled with the period of employment stated by the beneficiary on the labor certification. Furthermore, on Form G-325A signed by the beneficiary on July 3, 2007, the beneficiary states that she has been working for the petitioner, as a manager, since April 2005 to present. Even though the beneficiary was requested to list her past employment for the last five years from the date Form G325 was signed, the beneficiary did not mention any other employment. The beneficiary

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[5] AAO will consider that the beneficiary worked for at least until the date that the beneficiary signed Form ETA750, on January 6, 2004.

[6] No information about could be obtained to verify the current status of or its current or former address.

did not list her employment with as listed on Form ETA 750. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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). In all cases, the burden of proof is on the petitioner, to establish the beneficiary's eligibility by a preponderance of the evidence. [See Section 291 INA; *Matter of Sun*, 12 I. & N. Dec. 800, Interim Decision (BIA) 1885 (1968)]. A "preponderance of the evidence" is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not". [Black's Law Dictionary 1064 (5th ed. 1979)] See I.D. 3112 (BIA 1989). In this case, the evidence does not show that it is more likely than not that the beneficiary gained the experience as described in the experience letter, and listed on Form ETA 750 and Form G325.

Due to the discrepancies above, The AAO considers that the petitioner failed to demonstrate by credible and preponderant evidence that the beneficiary has the twenty four (24) months of experience as a Manager/Food Store. 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 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.