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

(b)(6)

[redacted]

DATE: OCT 0 2 2012 OFFICE: TEXAS 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition and invalidated the labor certification. A subsequent a motion to reopen and reconsider was dismissed. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed. The labor certification will remain invalidated.

The petitioner describes itself as a convenience store and gas station. It seeks to permanently employ the beneficiary[1] in the United States as a night manager. 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).[2]

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is May 14, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed 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 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656).

[2] 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

Evidence of the Beneficiary's Qualifications

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 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 labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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, the labor certification states that the offered position requires two years of experience as a convenience store and gas station night manager.

The beneficiary signed Part B of the labor certification on June 30, 2007 under a declaration that the contents are true and correct under penalty of perjury. It states that the beneficiary qualifies for the offered position based on the following experience:

Position:	Night Manager
Employer:	[redacted][4] Texas
Dates of Employment:	February 2002 through April 2004
Position:	Manager
Employer:	[redacted] Texas
Dates of Employment:	May 2004 through January 2005
Position:	Night Manager
Employer:	[redacted], Texas
Dates of Employment:	February 2005 through "present"

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

[4] The beneficiary's Form G-325 also signed on June 30, 2007 states that [redacted] is located in [redacted], Texas.

The record contains an April 4, 2004 letter from President on letterhead stating that the company employed the beneficiary as a night manager from February 2002 through April 2004. The letter states that the beneficiary performed the following duties:

> Oversee convenience store; prepared employee work schedule; operate cash register and credit card machine; sell food, groceries; maintain inventory and equipment; be responsible for ordering and purchasing; reconcile all accounts; and prepared daily sales reports.

On June 2, 2009 the director issued a Notice of Intent to Deny indicating that records from the Texas Secretary of State establish that , doing business as was inactive in reporting year 2002. The director also noted that records from the Texas Workforce Commission (TWC) showed that did not report any wages until the third quarter of 2002. Additionally, the director noted, the company reported only two employees from the third quarter of 2002 to the fourth quarter of 2004. Those employees were President and The director also noted that reported wages for [5] from the second quarter of 2004 to the first quarter of 2008. Finally, the director noted that the records do not indicate that the beneficiary ever worked for .

In response to the director's Notice of Intent to Deny, the petitioner submitted an undated letter from on letterhead. The letter states that, "Our business start for customers in 3rd quarter of 2002, in between his job was to watch on the work of our construction/remodeling, set up accounts with our vendors, hiring for employment/training and store set up. Our cooperation was open in September 2000 but active in 3rd quarter of 2002." (Original language maintained.)

The petitioner also submitted two letters dated June 27, 2009 from on " " letterhead and on " " letterhead, respectively. The letters state that the beneficiary was employed as a night manager from March 1997 through January 1998 at Texas; and was employed as a night manager from February 1998 through April 1999 at Texas.

On July 16, 2007 the director denied the petition noting that the work experience represented on the letters from Mohamad Nowrouzi was not previously claimed.[6] The director referenced the *Matter of*

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[5] It is noted that the original beneficiary of the instant Form ETA 750 is

[6] 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).

Leung, 16 I&N Dec. 2530 (BIA 1976), and found that the newly claimed employment experience was not credible. The director also stated that the second letter from President of characterizes the beneficiary's work experience in a significantly different manner than how it was represented in the first letter. The director invalidated the labor certification.

On August 18, 2009 the petitioner filed a motion to reopen and reconsider the director's July 16, 2009 decision. On November 12, 2009, the director dismissed the petitioner's motion.

On appeal, counsel asserts that the discrepancies in the record regarding the beneficiary's duties at were adequately addressed by the previously submitted letter from the president of . Counsel also submits a photocopy of *Matter of Leung, supra*, and asserts that it does not prohibit the consideration of work experience that is not listed on the labor certification.

Counsel's assertions on appeal are not persuasive. There remains no explanation as to why the two letters from president of contain significantly different information. The April 4, 2004 letter from states that the beneficiary worked as a night manager beginning in February 2002; whereas the subsequently submitted, undated letter indicates that the beneficiary was engaged in start-up duties, (not night manager duties,) until at least the third quarter of 2002. Additionally, the record contains no explanation as to why the beneficiary was not listed as an employee of in the company's list of employees in 2002 through 2004.

Regarding the *Matter of Leung*, while the holding does not specifically prohibit the consideration of previously unclaimed work experience, the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The petitioner did not resolve the inconsistencies in the record with independent, objective evidence of the beneficiary's prior employment.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Evidence of the Petitioner's Ability to Pay the Proffered Wage

Beyond the decision of the director, the petitioner has also 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).

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. 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.[7] 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).

In the instant case, there is no evidence to establish that the petitioner employed the beneficiary. The petitioner's net income of -$116,912[8] and net current assets of $28,457 in 2005, were not equal or greater to the proffered wage of $3,200 per month ($38,400 per year). Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Additionally, according to USCIS records, the petitioner has filed three I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The petitioner has not established

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[7] *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).

[8] It is noted that in a June 21, 2007 letter, the petitioner claims its net income in 2005 was $219,105. However, the petitioner's IRS Form 1120S does not support the claim. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2005) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed September 7, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). In this case line 21 of page one shows a *loss* of $219,105, not income, as claimed in the petitioner's letter. Because the petitioner had additional income shown on its Schedule K for 2005, the petitioner's net income is found on Schedule K of its 2005 tax return. The amount on line 17e of Schedule K is -$116,912.

its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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).

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. The alien employment certification, Form ETA 750, ETA case number D-05222-00532, remains invalidated.