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

DATE: APR 0 3 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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 Director, Texas Service Center, denied the preference visa petition. The Acting Director, Texas Service Center, dismissed the petitioner's motion to reopen and reconsider the decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner owns and operates a restaurant in New York City.[1] It seeks to employ the beneficiary permanently in the United States as a "Specialty Cook, Foreign Food."[2] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

The director determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage since the priority date of the visa petition. The director denied the petition accordingly. The acting director dismissed the petitioner's motion to reopen, finding that the petitioner again failed to demonstrate its continuing ability to pay the offered wage.

The AAO has jurisdiction in this matter. *See* 8 C.F.R. § 103.5(a)(6). 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.

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[1] The petitioner does business as , according to copies of its federal tax returns in the record.

[2] Although the labor certification identifies the offered position as "Specialty Cook, Foreign Food," the Form I-140, Petition for Alien Worker, states the job title as "Cook." According to the labor certification, the job duties of the offered position include preparing and cooking "Mexican style dishes" such as guacamole, quesadillas, ceviche, tamales, chimichangas and huevos rancheros. While the menu on the petitioner's website includes a few Mexican dishes, such as huevos rancheros, quesadilla and Polla Escondido, the majority of the dishes on the menu are American, including burgers, sandwiches, soups and salads. *See* (accessed March 8, 2013). Given the preponderance of American food on the petitioner's menu, the AAO finds it unclear whether the petitioner intends to employ the beneficiary full-time in the offered position described on the labor certification. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence). The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). The petitioner must provide independent, objective evidence that it intends to employ the beneficiary full-time in the offered position described in the labor certification. *Matter of Ho*, 19 I&N Dec. at 591-592.

As set forth in the director's April 15, 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 Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the DOL accepted the Form ETA 750 on April 20, 2001. The proffered wage, as stated on the Form ETA 750, is $17.43 per hour and $26.15 per hour of overtime. The offered position's weekly hours total 40 basic hours and 10 overtime hours, according to the labor certification. Thus, the AAO computes the annual offered wage, including overtime, to be $49,852.40 ($36,254.40 in regular wages, plus $13,598 in overtime wages).[3] The Form ETA 750 also states that the position requires four years of high school and three years of full-time experience in the offered position.

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[3] The director, the acting director and the petitioner identify the annual offered wage as "$36,244." They do not appear to include the position's required overtime hours and wages in their proffered wage calculations. *See Matter of Mrs. Esther Friedman*, 88-INA-583 (BALCA, Oct. 13, 1989) (where job requirements on labor certification specify overtime hours at one-and-a-half times the basic hourly rate, the overtime hours and wages must be included in the offered wage). *See also* former 20 C.F.R. § 656.20(c)(7) (2004) (recodified at 20 C.F.R. § 656.10(c)(7) as of March 25, 2005) (the offered position's terms, conditions and occupational environment must not be contrary to federal, state or local law). In his May 5, 2008 request for evidence, the director misstates the offered wage as $13 an hour. In a July 21, 2010 affidavit, three of the petitioner's owners also misstate the offered wage as $13 an hour. On its Form I-140, the petitioner states the position's offered weekly

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.[4]

The evidence in the record shows that the petitioner is structured as a C corporation. On the Form I-140, the petitioner claimed to have been established in 1992, to have a gross annual income of $1.1 million, and to employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, which the beneficiary signed on April 17, 2001, the beneficiary claimed to work for the petitioner in the offered position since October 1995.[5]

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. USCIS will also consider the totality of the circumstances affecting the petitioning business. *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, although the beneficiary claims to have worked for the petitioner since October 1995, the petitioner has not submitted any evidence that it has employed and paid the beneficiary. The petitioner has therefore not established the continuing ability to pay the offered wage based on its employment of the beneficiary.

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wages as $697.20, which reflects 40 hours at the basic hourly rate of $17.43 but does not include the overtime hours and wages that the labor certification specifies.

[4] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, 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).

[5] The beneficiary also states on the Form ETA 750B that he has worked 50 hours per week in the offered position, in accordance with the hours the petitioner states in its offer of employment on Form ETA 750A.

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), *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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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).

For a C corporation, USCIS considers net income to be the figure shown on line 28 of the U.S. Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on October 15, 2008, with his receipt of the petitioner's submissions in response to the request for evidence.[6] As of that date, the petitioner's 2008 federal tax return was not yet due. The petitioner later submitted copies of its 2008 return with its motion to reopen, along with evidence that it requested an extension of time in which to file its 2009 return with the IRS. The petitioner's 2008 tax return is therefore the most recent return available.

The petitioner's tax returns show annual net income amounts, as follows: $34,998 in 2001; $6,824 in 2002; $(20,087)[7] in 2003; $19,609 in 2004; $3,852 in 2005; $21,418 in 2006; $15,154 in 2007; and $36,858 in 2008. Because none of these annual amounts equal or exceed the annual proffered wage of $49,852.40, the petitioner has failed to demonstrate the continuing ability to pay the proffered wage based on its net income.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, and include cash on-hand. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. If the total of a corporation's year-end 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 show year-end net current asset amounts, as follows: the petitioner did not provide a complete copy of its 2001 Schedule L, preventing the AAO from determining its year-end net current asset amount for 2001;[9] $(37,823) in 2002; $(26,187) in 2003; $(11,285) in 2004;

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[6] The director exercised his discretion and considered the petitioner's response to the May 5, 2008 request for evidence beyond the request's 42-day deadline. *See* 8 C.F.R. § 103.2(b)(13)(i) (authorizing director to summarily deny a petition where the petitioner fails to respond to a request for evidence by the required date).

[7] Numbers in parentheses reflect negative amounts.

[8] 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.

[9] Schedule L is an incomplete copy, preventing the AAO from determining the petitioner's year-end current assets on its 2001 tax return. The lines above line 10 on Schedule L are not included on the photocopy of the return. Line 15 of Schedule L, however, states total assets of $154,157. Lines 10b, 13b and 14 of Schedule L state a total of $97,506 in non-current assets. Even if the AAO were to assume that all of the assets not visible above line 10 were current assets, the petitioner's 2001 current assets would only total $56,651. With year-end current liabilities of $56,560 shown on lines

$(7,128) in 2005; $930 in 2006; $(58,397) in 2007; and approximately $(67,341) in 2008.[10] Because none of the year-end net current asset amounts on the petitioner's tax returns equal or exceed the annual offered wage of $49,852.40, the petitioner has failed to establish the continuing ability to pay the offered wage based on its net current assets.

Therefore, from the date the DOL accepted Form ETA 750 for processing, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage based on examinations of wages it paid to the beneficiary, its net income, and its net current assets.

In addition, USCIS records indicate that the petitioner has filed immigrant visa petitions for at least three other workers since filing this petition. The petitioner must demonstrate the continuing ability to pay the combined proffered wage of each I-140 beneficiary from the instant petition's priority date until the corresponding beneficiary obtains permanent residence, or until the denial of the petition. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not demonstrated its ability to pay the instant beneficiary, let alone the continuing ability to simultaneously pay all of its I-140 beneficiaries.

On appeal, counsel asserts that the petitioner can demonstrate the ability to pay the instant beneficiary's offered wage in all but two years – 2003 and 2008 – based on the willingness of the petitioner's three owners to reduce their officer compensation amounts. The petitioner submitted an affidavit signed by its president and two other shareholders.[11] The shareholders state that they, together, own all of the petitioner's shares and would reduce their officer compensation amounts to pay the beneficiary's offered wage. According to the petitioner's tax returns, line 12 of Forms 1120, the petitioner paid the following annual amounts in officer compensation: $23,820 in 2001; $89,641 in 2002; $71,300 in 2004; $76,775 in 2005; $52,000 in 2006; and $54,000 in 2007. The petitioner's tax returns do not reflect officer compensation amounts in 2003 and 2008. Counsel argues that the annual officer compensation amounts in 2002, 2004, 2005, 2006 and 2007 exceed the annual offered wage. Counsel also argues that the $23,820 in annual officer compensation in 2001 could be combined with the petitioner's annual net income of $34,998 that year to pay the offered wage.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, USCIS generally cannot consider the assets of a company's shareholders (or of other enterprises or

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16-18 of Schedule L, the petitioner's maximum year-end net current asset amount would be $91. This figure, however, is speculative. In any future filings, the petitioner must provide complete, accurate copies of its federal tax returns if it intends to establish its continuing ability to pay the proffered wage using tax returns pursuant to the regulation at 8 C.F.R. § 204.5(g)(2).

[10] The numbers in the far-right, "ones" columns of the petitioner's 2008 year-end current assets and liabilities on Schedule L are illegible on the copy of the tax return. The numbers in the far-right columns, however, are not material to the AAO's determination, as the petitioner's current liabilities exceed its current assets on its 2008 tax return by a substantial amount, based on the "thousands" and "hundreds" columns, which are visible.

[11] USCIS records indicate that another '[redacted]' restaurant in New York City lists the additional shareholders as its general partners or vice president on multiple immigrant visa petitions, as well. The relationship between the petitioner and this other "[redacted]" entity is unclear.

corporations) 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); *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) ("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").

Under certain circumstances, however, USCIS will consider a petitioning corporation's compensation for officers as an additional financial resource available to pay the offered wage. But the petitioner must submit evidence to establish that the officers receive compensation and own the corporation, statements from the officers that they will forego their compensation, evidence that the officers can support themselves and their dependents without the compensation, and evidence that the officer compensation amounts were discretionary expenses and not fixed salaries.

Here, the fluctuating annual amounts of officer compensation on the petitioner's tax returns suggest that the compensation amounts were discretionary expenses and not fixed salaries. The petitioner has also submitted a statement signed by three shareholders. But the AAO finds that the petitioner has not established that its officer compensation amounts are available to pay the offered wage.

First, the petitioner has not established that the three officers who signed the affidavit together own all, or even a majority, of the corporation's stock. According to the Schedules E of the petitioner's tax returns for 2001 through 2005, the three affiants owned all of the petitioner's stock, with each holding 33 percent of its shares. But the Schedules E of the petitioner's tax returns from 2006 through 2008 identify seven owners of the petitioner, with the affiants owning 45 percent of the petitioner's shares and the other four owners holding 55 percent of the shares. The affidavit of these three owners does not obligate other shareholders of the petitioner to forego officer compensation they may have received. Further, the record does not document whether the affiants have the authority to allocate expenses in the manor proposed in their affidavit.

Therefore, the AAO finds that the petitioner has not established whether the affiants have the authority to allocate the amounts previously allocated to officer compensation for the beneficiary's proffered wage, or if so authorized, that the officer compensation does not represent a salary for the officer(s). The petitioner must resolve inconsistencies in the record with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-592.

Moreover, the petitioner has not demonstrated that the three shareholders could support themselves and any dependents in the absence of the petitioner's officer compensation. The petitioner did not submit copies of the shareholders' federal tax returns, W-2 statements, or other evidence of their financial statuses. The AAO is therefore unable to determine whether the owners could realistically forego their compensation from the petitioner, even if the petitioner had demonstrated that they had the authority to do so.

In addition, the affidavit from the three shareholders states that "[i]f necessary to cover the proffered wage, we *will reduce* officer compensation to pay the offered wage of [the beneficiary]." (emphasis

added). By stating their promise in the future tense, the owners have pledged to forego compensation occurring after the execution of the affidavit on July 21, 2010. The owners did not state they would, or could, forego the compensation they received before 2010. Therefore, the petitioner has not established that its officer compensation paid before 2010 was available to pay the offered wage. A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In addition, even if the petitioner had shown that the shareholders would and could forego the officer compensation that they previously received in each of the relevant years, the petitioner has not established that the total foregone compensation would equal or exceed the combined proffered wages of the beneficiary and the beneficiaries of its other petitions. For the foregoing reasons, the AAO finds that the petitioner has failed to establish that it can pay the offered wage with the amounts already allocated to officer compensation.

Counsel next argues that the petitioner's year-end cash balances were available to pay portions of the offered wage. The petitioner's tax returns show the following year-end cash balances on Form 1120, Schedule L, line 1: $2,734 in 2003; $13,045 in 2004; $2,372 in 2005; $4,085 in 2006; $13,707 in 2007; and $9,865 in 2008.[12]

Counsel's reliance on year-end cash balances as a component of funds available to pay the offered wage is misplaced. The petitioner pays portions of its annual revenues in expenses. The balance reflects the petitioner's net income. Of its net income, the petitioner may retain some as cash. Adding the petitioner's year-end cash balances, as shown on its Schedules L, to the corresponding annual net income amounts would therefore "double count" portions of its revenues, at least in part.

Therefore, USCIS has already considered the petitioner's year-end cash balances from Schedule L in its analysis of the petitioner's net current assets, which are considered separately from its net income. In the net current assets analysis, USCIS included the year-end cash balances as year-end current assets. Counsel's argument fails to recognize that year-end current liabilities offset the petitioner's year-end cash balances. Considering cash balances or other current assets in determining a petitioner's ability to pay would overstate the petitioner's financial resources unless corresponding current liabilities are also considered. *See Taco Especial*, 696 F. Supp. 2d at 881 (in similar analysis, court determined that gross profits overstate an employer's ability to pay because it ignores other necessary expenses). The net current asset amounts are prospective "snapshots" of the net total of the petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. The AAO therefore finds it inappropriate to consider year-end cash balances without including current liabilities for the same time periods.

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[12] The petitioner's year-end cash balance in 2002 was negative, according to its tax return, and its year-end cash balance in 2001 is not included on the incomplete copy of the petitioner's 2001 Schedule L.

Counsel also asserts that USCIS should consider the petitioner's depreciation deductions in determining the petitioner's ability to pay the offered wage. Counsel argues that depreciation amounts do not reflect actual cash operating expenses and therefore reflect funds available to pay the offered wage. Counsel cites a non-precedent AAO decision from 2002 and notes that the petitioner's tax returns show the following annual depreciation expense deductions: $37,241 in 2001; $30,373 in 2002; $18,522 in 2003; $9,276 in 2004; $9,224 in 2005; $8,780 in 2006; $16,722 in 2007; and $482 in 2008.

As discussed previously, USCIS will not add depreciation amounts back into a petitioner's net income to determine its ability to pay the offered wage. While depreciation amounts do not represent current cash expenses, they represent actual costs of doing business, such as the diminution in the value of a petitioner's buildings and/or equipment, or the accumulation of funds needed to replace its buildings and/or equipment. *See River Street Donuts*, 558 F.3d at 118. Federal courts have upheld USCIS decisions barring the inclusion of depreciation in a petitioner's net income. *See id.*; *Chi-Feng Chang*, 719 F.Supp. at 537.

In addition, the AAO is not bound by its 2002 non-precedent decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The AAO therefore finds that the petitioner has not established grounds or legal precedent for adding back its depreciation expense deductions to its net income to pay the proffered wage.

Counsel also argues that USCIS should prorate the 2001 offered wage because the petitioner is not obligated to demonstrate its ability to pay the wage before the April 20, 2001 priority date. Therefore, counsel asserts that the petitioner must demonstrate an ability to pay only the portion of the annual offered wage arising after April 20, 2001, or $21,142.[13] Counsel also cites a non-precedent 2004 AAO decision in support of her argument. We will not allow the petitioner to use income generated over 12 months to demonstrate an ability to pay a proffered wage of less than eight months, just as we would not allow a petitioner to use income generated over two years to demonstrate an ability to pay an annual offered wage. The AAO will prorate a proffered wage only if the record contains evidence of receipt of net income, or payment of the beneficiary's wages - such as monthly income statements or pay stubs - during the portion of the year after the priority date. Here, the petitioner has not submitted evidence that it generated its 2001 net income after the priority date of April 20, 2001. The AAO therefore cannot consider whether the petitioner could establish its ability to pay a prorated proffered wage in 2001.

Finally, counsel argues that USCIS should consider the magnitude of the petitioner's business activities in determining its ability to pay the offered wage. Counsel argues that, by adding its annual amounts of net income, officer compensation, depreciation and cash balances, the petitioner demonstrates an ability to pay the offered wage from 2001 to 2008, except for 2003. Citing *Sonegawa*, 12 I&N Dec. 612,

[13] This prorated amount that counsel asserts is based on an incorrect proffered wage that does not include overtime wages, as discussed previously.

counsel urges USCIS to excuse the petitioner's inability to pay the offered wage in 2003, noting growth in the petitioner's gross receipts and annual amounts of wages paid from 2001 to 2008.

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 Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California.

The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may 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, like the petitioner in *Sonegawa*, has conducted business for more than 10 years. As counsel notes, the petitioner's revenues have increased each year since 2001 and its annual amounts of wages paid have increased over the same period of time, according to its tax returns. The petitioner claims to employ 15 workers, but the wages reported do not document significant amounts in consideration of the total number of employees. Further, the annual wages reported on the petitioner's tax returns fluctuate by large amounts from year to year. Unlike the petitioner in *Sonegawa*, the petitioner has also not identified any uncharacteristic business loss or expense that otherwise prevented it from demonstrating its ability to pay, nor has it established that it enjoys an outstanding reputation in its industry. In addition, unlike the petitioner in *Sonegawa*, the petitioner in the instant case must not only demonstrate a continuing ability to pay the offered wage of the beneficiary, but also to pay the offered wages of the other workers on whose behalf it has filed immigrant visa petitions. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not established the continuing ability to pay the proffered wage since 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 Wing's Tea House,* 16 I&N Dec. at 159; *see also Katigbak,* 14 I&N Dec. at 49.

To determine whether a beneficiary is eligible for an employment-based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 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 "4" years of high school and "3" years of full-time employment experience in the offered position. On the labor certification, the beneficiary claims to qualify for the offered position based on attending high school in Mexico and working "50" hours per week for more than five years as a cook in Mexico.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the each employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). Here, the petitioner has submitted a letter from the beneficiary's purported employer in Mexico, , stating that the beneficiary worked as a cook from March 15, 1990 to May 15, 1995. The start date of employment claimed in the letter indicates that the beneficiary began working before completing high school, as the beneficiary stated on ETA Form 750B that he attended high school until June 1990. The AAO doubts that the beneficiary could have worked 50 hours per week while attending high school. The letter does not indicate whether the beneficiary was employed full- or part-time.

Also, the record shows that the beneficiary was only 19 years old when he began working as a cook, yet the letter indicates that the beneficiary was "in charge of the area of production of aliments and barbecue." The website of the beneficiary's previous employer indicates that its restaurant was named one of the "25 best restaurants in the world." *See* (accessed March 11, 2013). The AAO therefore doubts that the beneficiary would have been "in charge" of a production area at a top restaurant as a 19-year-old, entry-level cook. The petitioner must resolve any inconsistencies in the record by independent, objective evidence. *See Matter of Ho*, 19 I&N at 591-92. In addition, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of its remaining evidence. *Id.*, at 591.

The petitioner also failed to establish that the beneficiary attended four years of high school as the labor certification specifies. The petitioner did not submit any educational credentials of the beneficiary with its petition. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (skilled worker petition "must be accompanied by evidence that the alien meets the education, training or experience, or any other requirements of the individual labor certification"). In addition, the beneficiary states on the labor certification that he attended only three years of high school, from September 1987 to June 1990. Also, as discussed above, the beneficiary's purported dates of education overlap with his claimed dates of full-time (50 hours per

week) employment. The AAO therefore finds that the petitioner failed to demonstrate that the beneficiary has the experience and educational qualifications that the labor certification requires.

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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

In summary, the evidence in the record does not establish that the petitioner had the continuing ability to pay the proffered wage since the priority date. Nor does the evidence demonstrate that the beneficiary possessed the required employment experience and education set forth on the labor certification.

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.