(b)(6)

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

DATE: JAN - 4 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:

SELF-REPRESENTED

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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.[1]

The petitioner is a deli. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a duplicate Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification) approved by the United States Department of Labor (DOL).[2] The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker and that the petitioner had not established that it had the continuing ability to pay the proffered wage. 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.

The director identified two issues in his November 2, 2009 denial, whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker and whether or not the petitioner has the continuing ability to pay the proffered wage. On appeal, the AAO has identified another issue, whether or not the petitioner has established that that the beneficiary possessed the minimum education and experience required to perform the proffered position by the priority date.

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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of

---

[1] 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).

[2] The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the DOL upon the written request of a consular or immigration officer. The record contains a duplicate labor certification.

performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Classification as a Skilled Worker

Here, the Form I-140 was filed on November 26, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

One of the bases for the director's denial was that the petitioner did not establish that the offered position required two years of training or experience thus qualifying the position for a skilled worker classification; however, on appeal the petitioner makes no assertion regarding this issue.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

> (2) Definitions. As used in this part:
>
> Other worker means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available.
>
> Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.
>
> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification requires six years of grade school education, six years of high school education and three months of experience as either a specialty cook or a cook. The labor certification does not require any training.

The petitioner requested the skilled worker classification on the Form I-140, which as defined above, requires two years of training or experience. The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Continuing 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.* 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 Form ETA 750 was accepted on May 2, 2001. The proffered wage as stated on the Form ETA 750 is $13 per hour ($27,040 per year).

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 1990. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 29, 2001, the beneficiary stated he worked for the petitioner beginning in November 1999 continuously until April 29, 2001, the date he signed the labor certification.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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).

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.

On appeal, the petitioner asserts it employed and paid the beneficiary. As evidence, the petitioner submits copies of two checks it issued to the beneficiary. The first check is dated September 30, 2005 in the amount of $2,240, and the second check is dated February 27, 2008 in the amount of $2,317.

The petitioner also submitted copies of IRS Form 1040, Schedule C, for the years 2004, 2005, 2006, 2007, and 2008, which list the beneficiary as the proprietor.[3] According to the copies of the 2004 and 2007 Schedules C, the beneficiary reported self-employment income for newspaper delivery; therefore, these two Schedules C do not provide evidence of wages paid by the petitioner to the beneficiary for services rendered. According to the copies of the 2005 and 2006 Schedules C, the beneficiary reported self-employment income for being a cook. According to the copy of the 2008 Schedule C, the beneficiary reported self-employment income for providing services with a corresponding activity code of 722210 placed in box B, which is the code for limited-service eating places.[4] With the exception of the checks written in 2005 and 2008 detailed above, the record contains no evidence, such as IRS Forms 1099, that the monies reported as income on the 2005, 2006, and 2008 Schedules C were earned by the beneficiary while working for the petitioner. The petitioner also submitted five letters from third parties stating each of the five writers is acquainted with the beneficiary.[5] Three of the five letters state the beneficiary works at the petitioner's place of business, while the other two letters state the writers understand the beneficiary works at the petitioner's place of business. However, none of these letters provides independent, objective evidence of the wages paid to the beneficiary by the petitioner.

Thus, in the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date or subsequently.[6] Thus, it must establish that it can pay the difference between the proffered wage and the wages reflected on the checks issued to the beneficiary in 2005 and 2008, which is $24,800 and $24,723, respectively, and it must establish that it can pay the full proffered wage in 2001, 2002, 2003, 2004, 2006 and 2007.

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,

---

[3] A Schedule C is used to report income or loss from a business operating as a sole proprietorship. *See* http://www.irs.gov/pub/irs-pdf/I1040sc.pdf (accessed November 14, 2012). The record does not contain the beneficiary's complete federal income tax returns; therefore, it is not possible to determine if the Schedules C were a part of the beneficiary's tax return in those years.

[4] *See* http://www.irs.gov/pub/irs-pdf/I1040sc.pdf (accessed November 14, 2012).

[5] The letters were submitted with the appeal, but the record does not explain why they were submitted.

[6] In its September 10, 2008 letter, the petitioner stated that it did not issue the beneficiary an Internal Revenue Service (IRS) Form W-2 in 2001, 2002, 2004, and 2005.

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.
>
> 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 contained the petitioner's federal income tax returns for the years 2001 through 2006.[7] On appeal, the petitioner submitted the first page of its 2007 and 2008 federal income tax returns. The petitioner's tax returns demonstrate its net income for the years 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120S stated net income[8] of $9,547.
- In 2002, the Form 1120S stated net income of $14,446.
- In 2003, the Form 1120S stated net income of $24,999.
- In 2004, the Form 1120S stated net income of $5,543.
- In 2005, the Form 1120S stated net income of $10,540.
- In 2006, the Form 1120S stated net income of $20,340.
- In 2007, the petitioner's net income cannot be determined.[9]
- In 2008, the petitioner's net income cannot be determined.

Therefore, for the years 2001 through 2008, the petitioner did not establish that it had sufficient net income to pay the proffered wage or 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.[10] A corporation's year-end current assets are shown

---

[7] The record also contains copies of the first page of the petitioner's IRS Form 941 Employer's Quarterly Federal Tax Return for the first three quarters of 2007; however, the Form 941 does not identify the petitioner's employees or how much each employee was being paid.

[8] 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 23 (2001-2003), line 17e (2004-2005), and line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 14, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for the years 2001 through 2006, the petitioner's net income is found on Schedule K of its tax returns for those years.

[9] The petitioner did not submit its Schedule K for the years 2007 and 2008; therefore, it is not possible to determine its net income in those years.

[10] 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.

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 the years 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $15,294.[11]
- In 2002, the Form 1120S stated net current assets of $12,769.[12]
- In 2003, the Form 1120S stated net current assets of $10,797.[13]
- In 2004, the petitioner did not submit the regulatory-prescribed evidence.[14]
- In 2005, the petitioner did not submit the regulatory-prescribed evidence.[15]
- In 2006, the petitioner did not submit the regulatory-prescribed evidence.[16]
- In 2007, the petitioner did not submit the regulatory-prescribed evidence.[17]
- In 2008, the petitioner did not submit the regulatory-prescribed evidence.

Therefore, for the years 2001 through 2008, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage or the difference between the proffered wage and the wages paid to the beneficiary.

Therefore, from the date the Form ETA 750 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.

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

---

[11] The director incorrectly stated this amount as -$208,803.
[12] The director incorrectly stated this amount as -$189,328.
[13] The director incorrectly stated this amount as -$159,300.
[14] The petitioner's 2004 Schedule L was not completed. The director incorrectly stated this amount as $5,543.
[15] The petitioner's 2005 Schedule L was not completed. The director incorrectly stated this amount as $10,540.
[16] The petitioner's 2006 Schedule L was not completed. The director incorrectly stated this amount as $20,340.
[17] The petitioner did not submit its Schedule L for the years 2007 and 2008; therefore, it is not possible to determine its net current assets for those years.

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 has not established its historical growth. There is no evidence of the petitioner's reputation in its industry. There is no evidence of the occurrence of any uncharacteristic business expenditures or losses from which the petitioner has since recovered. There is no evidence the beneficiary will be replacing a former employee or an outsourced service. 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.

Beneficiary Qualifications: Education and Experience

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'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 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 six years of grade school education and six years of high school education, as well as three months of experience as either a specialty cook or a cook. On the labor certification, the beneficiary claims to have six years of elementary education, two years of middle school education, two years of teacher training school,

and four years of college education, but the record contains no evidence, such as attendance records, transcripts, graduation records or degrees, establishing that the beneficiary has the required education. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook for the petitioner from November 1999 until April 29, 2001 working 40 hours per week. The labor certification also lists two other employments for the beneficiary, neither of which is for a specialty cook or cook position.

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 dated September 10, 2008 from on the petitioner's computer-generated letterhead stating the beneficiary worked for the petitioner from November 1999 to July 2000 and then again from October 2000 until September 10, 2008. The letter lists duties consistent with those of a cook. The letter does not indicate whether the beneficiary's employment was full-time or part-time.

The dates of employment as stated by in the September 10, 2008 letter differ from the dates of employment as listed on the labor certification which states the beneficiary worked for the petitioner *continuously* from November 1999 until April 29, 2001.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition...[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not resolved the inconsistent employment dates in the record with independent, objective evidence.

Finally, as previously mentioned, the petitioner submitted five letters from third parties stating each of the five writers is acquainted with the beneficiary. Three of the five letters state the beneficiary works at the petitioner's place of business, while the other two letters state the writers understand the beneficiary works at the petitioner's place of business. None of these letters indicate that the respective writers were former employers of the beneficiary; therefore, none of these five letters will be considered as evidence of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The evidence in the record does not establish that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.