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: JUN 2 0 2013 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)(A)(i) or (ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i) or (ii)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner[1] is a sportswear business. It seeks to employ the beneficiary permanently in the United States as a shipping supervisor. 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 had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 17, 2009 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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

[1] The Form ETA 750 lists the petitioner's name as [redacted] with an address of [redacted], New York, NY [redacted] and the Form I-140 lists the petitioner's name as [redacted] with an address of [redacted] New York, NY [redacted] and tax identification number of [redacted]. The tax returns submitted for the petitioner list the name as [redacted] with an address of [redacted] New York, NY [redacted] and tax identification number of [redacted] For these tax returns to be considered, the petitioner must establish that [redacted] is the same entity as [redacted] It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 19 88).

> 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, 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $15.57 per hour ($32,385.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on January 1, 1973 and to have a gross annual income of $5,795,027. Form I-140 does not state the petitioner's current number of employees as required by the form. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner.

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

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[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).

affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or any wages from the priority date of April 30, 2001 onward.[3]

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

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[3] The petitioner sent several paystubs for 2009, but those pay statements list a different entity than the petitioner. Other evidence in the record shows this entity has a separate tax identification number. Therefore, these paystubs cannot be used to demonstrate the petitioner's ability to pay the proffered wage for 2009. The record also contains the beneficiary's individual Form 1040 tax transcripts for 2003, 2004 and 2005. However, these transcripts do not show any wages, salaries, or tips, or show any W-2 wages from the petitioner.

> 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 Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on April 9, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 through 2006, as shown in the table below.

- In 2001, the Form 1120 stated net income of $66,933.
- In 2002, the Form 1120 stated net income of $208,955.
- In 2003, the Form 1120 stated net income of $619,187.
- In 2004, the Form 1120 stated net income of $743,852.
- In 2005, the Form 1120 stated net income of $(210,291).
- In 2006, the Form 1120 stated net income of $505,833.
- The Form 1120 for 2007 was not submitted.

Therefore, for the years 2001 through 2004, the petitioner would have had sufficient net income to pay the proffered wage, but it has not established this for 2005, 2006 and 2007.

As noted in the director's decision, however, the petitioner's 2006 return is on a Form 1120 for 2005 with a "6" written over the "5" in 2005. It lists the calendar year as January 1, 2006 to July 31, 2006. The petitioner failed to address this discrepancy on appeal. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any

attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the petitioner's 2006 tax return cannot be accepted. *Matter of Ho*, 19 I&N Dec. 582, 591 (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."

The 2006 tax return lists the beginning and end dates of the tax year as January 1, 2006 and July 31, 2006; the cover sheet from the tax preparer indicates that the return must be mailed by August 15, 2006; and Schedule L of the 2006 return contains numerical information for beginning of the year but no data other than zeroes for the end of the year assets and liabilities. The director requested an explanation of these issues and tax transcripts for the petitioner for 2005 through 2008. The petitioner did not address the concerns of the director and provided 2005 through 2007 tax returns, bank statements, 2007 and 2008 W-2 forms, pay vouchers, and a quarterly statement of deposits and filings for with a different tax identification number than the petitioner. The petitioner failed to send the IRS requested transcripts either in response to the director's decision or on appeal. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The record does not include any evidence that this company is a successor-in-interest to the petitioner.[4] Although, the record includes a July 20, 2007 letter from President of located at New York, NY in which he states that this company is sponsoring the beneficiary as a shipping supervisor, on the Form I-290B counsel[5] continues to assert that the petitioner is a "going concern"

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[4] has failed to establish that it is a successor-in-interest to the entity that filed the labor certification, petition and appeal in the instant matter. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If is a different entity than the petitioner/labor certification employer and appellant, 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 valid successor relationship may be established 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 evidence in the record does not satisfy all three conditions described above because noting in the record fully describes and documents any transaction transferring ownership of the predecessor and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods.

[5] The record is not clear as to whether counsel is currently practicing law. The New Jersey state bar

and is the entity which is continuing to offer a job to the beneficiary. There is no claim that is a successor-in-interest to the petitioner.

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.[6] 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. 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 2005, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of $305,581.
- In 2002, the Form 1120 stated net current assets of $(223,782).
- In 2003, the Form 1120 stated net current assets of $820,009.
- In 2004, the Form 1120 stated net current assets of $1,181,047.
- In 2005, the Form 1120 stated net current assets of $858,714.
- In 2006, the Form 1120 stated net current assets of $0.
- The Form 1120 for 2007 was not submitted.

Therefore, for the years 2001 and 2003 through 2005, the petitioner would have sufficient net current assets to pay the proffered wage. The petitioner cannot establish this for 2002, 2006 and 2007.

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.

The AAO also notes that there are concerns as to whether the petitioner is still in existence and therefore whether there continues to be a viable job offer.
On appeal, counsel asserts that a CNA endorsement issued on February 27, 2008 refers to and/or located at New York, NY

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lists her as administratively ineligible to practice law and the New York state bar lists her registration status as delinquent.

[6] 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.

and this information is evidence of the continued viability of the petitioner, that the petitioner is a "going concern" and that there is a realistic job offer to the beneficiary. The AAO notes that this document refers to the petitioner, but does not provide any evidence of its ability to pay the beneficiary the proffered wage. Additionally, the two entities referenced have separate tax identification numbers. Nothing shows that they are the same entity.

The AAO notes that New York State Department of State records reflects that with an address of New York, NY is currently listed in active status. *See* http://www.dos.ny.gov/corps/bus_entity_search.html (accessed June 17, 2013). The street number differs from the street number on the tax returns submitted. New York Department of State records have a second separate entity for *See* http://www.dos.ny.gov/corps/bus_entity_search.html (accessed June 17, 2013).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not offered an explanation for the filing of an income tax return for only part of 2006. The petitioner's claimed gross receipts decreased substantially between 2003 to 2006 to less than one-tenth of the 2003 gross. The 2006 tax return does not reflect any officer compensation paid, or salaries, wages, or any costs of labor paid. The number of employees is not clear, therefore, it cannot be determined if the salaries and wages listed in the tax returns in prior years are significant. The record does not include evidence of any unusual events that temporarily disrupted the business.

Considering these factors and the prior discussion of ability to pay the proffered wage, the AAO concludes that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established 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 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 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. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a shipping supervisor with [redacted] in Taxco, Gro., Mexico, from February 1987 until December 1990 and based on self-employed experience in various jobs in Jersey City, New Jersey from 1991 until April 20, 2001.

The beneficiary's claimed qualifying experience must be supported by a letter from the employer 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 an experience letter from [redacted] on [redacted] and [redacted]" letterhead stating that the beneficiary was a supervisor from February 1987 to December 1990 where he supervised and coordinated workers engaged in incoming and outgoing shipments, prepared bills and invoice orders, determined overseas priorities and prepared products for shipment. The record does not include the title for the signatory nor a translation for [redacted]." It is unclear whether this is the experience listed on the Form ETA 750 with [redacted]. Because the petitioner failed to submit full certified translations of the experience letter, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3).

The record does not contain an experience letter for the beneficiary's self-employment and regardless, the experience listed on the Form ETA 750B is not experience in the job being offered.

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

The AAO affirms the director's decision that the petitioner failed to establish that it had the ability to pay the beneficiary the proffered wage as of the priority date. In addition, the AAO finds 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 skilled worker under section 203(b)(3)(A) of the Act.

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.