U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 7 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

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

The petitioner[1] is a restaurant. It seeks to employ the beneficiary permanently in the United States as a sous chef. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment 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 August 9, 2012 denial, an 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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment

[1] The labor certification was initially filed by (labor certification entity) on November 19, 2008. In 2010, . merged in its entirety into (petitioner). While Form I-140, filed on October 3, 2011, indicates the petitioner's name to be , that entity ceased to exist in 2010.

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 ETA Form 9089 was accepted on November 19, 2008. The proffered wage as stated on the ETA Form 9089 is $21.88 per hour ($45,510.40 per year). The ETA Form 9089 states that the position requires 24 months experience in the job offered as a sous chef, or 24 months experience as a cook.

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 labor certification entity, , merged into a new entity, (petitioner) effective January 15, 2010. The evidence in the record of proceeding shows that the labor certification entity was structured as a C corporation, until its merger at which time it became a limited liability company.[3] On the petition, the labor certification entity claims to have been established in 2003, to have a gross annual income of over $1 million in 2010, and to employ 15 workers. According to the tax returns in the record, the labor certification entity's fiscal year begins September 1 and ends August 31 of the following year; the successor's tax year follows the calendar year. On the ETA Form 9089, signed by the beneficiary on April 19, 2011, 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 Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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

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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).

[3] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

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 labor certification entity and petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether either company 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 or the labor certification entity employed and paid the beneficiary the full proffered wage, or any wages, from the priority date.

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).

The petition's priority date is November 19, 2008, and the labor certification entity existed until its merger in January 2010. Therefore, the petitioner must establish the labor certification entity's ability to pay the proffered wage from the priority date to January 2010, and the petitioner's ability to pay from January 2010 onward. 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 July 9, 2012 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 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 is the most recent return available. The tax returns[4] in the record demonstrate net income for 2008 through 2011, as shown in the table below.

- In Fiscal Year (FY) 2008, Form 1120 stated net income of $54,775.
- In FY 2009, Form 1120 stated net income of $(963).
- In 2010, the petitioner's Form 1065 stated net income of $(34,355).[5]
- In 2011, the petitioner's Form 1065 stated net income of $26,449.

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[4] While 8 C.F.R. § 204.5(g)(2) permits the use of annual reports or audited financial statements, the petitioner has not submitted either of these forms of evidence for any of the years at issue.

[5] The record reflects that on January 15, 2010, the labor certification entity merged into the petitioner. The merger was an effective corporate restructuring where ownership of the original entity was transferred and assumed in the new LLC. The record also reflects that the labor certification entity followed a fiscal year; whereas, the petitioner follows the calendar year. Thus, the labor certification entity's fiscal year for 2009 overlaps the petitioner's calendar year for 2010. For a LLC, USCIS considers net income to be the figure shown as Ordinary business income (loss) (Line 22 - IRS Form 1065) or Line 1, top of page 4 (or page 5 on 2008-2010 returns) of IRS Form 1065 for relevant Schedule K net income (loss). The figure on the Schedule K is used if it is different from page 1, Line 22.

Therefore, for the years 2009 through 2011, the petitioner has not demonstrated that it or the labor certification entity had sufficient net income to pay the proffered wage. The AAO notes that the labor certification entity's fiscal year 2009 overlaps with the petitioner's calendar year 2010 tax return, however, as both entities reported negative income for those tax years, neither had sufficient net income to establish the ability to pay the beneficiary the proffered wage.

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 tax returns in the record demonstrate end-of-year net current assets for 2009 through 2011, as shown in the table below.

- In FY 2009, Form 1120 stated net current assets of $0.[7]
- In 2010, the petitioner's Form 1065 stated net income of $(48,440).[8]
- In 2011, the petitioner's Form 1065 stated net income of $(43,438).

The AAO notes that there is an overlap in reporting between the labor certification entity's FY 2009 and the petitioner's calendar year 2010; however, neither entity reported sufficient net current assets to demonstrate its ability to pay the proffered wage in either period. Therefore, for the years 2009 through 2011, the petitioner did not demonstrate that it or the labor certification entity had sufficient net current assets to pay the beneficiary the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it or the labor certification entity 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 net income or net current assets.

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[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.

[7] The petitioner indicates the merger occurred on January 15, 2010, therefore the labor certification entity's FY 2009 tax return indicates no year-end assets or liabilities as they appear to have merged into the petitioner and would be reflected on that entity's calendar year 2010 tax return.

[8] For a LLC, USCIS considers net current assets to be the difference between Schedule L, Lines 1 through 6 and Lines 15-17 (IRS Form 1065).

Counsel asserts in his brief accompanying the appeal that there is credible evidence of available assets to establish the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel concedes that the petitioner's net income and net current assets fall short of satisfying the proffered wage; however, counsel contends that the petitioner's bank statements, lines of credit and discretionary officer's compensation support its ability to pay the proffered wage.

The record contains the petitioner's bank statements from November 2008 through June 2012. Counsel asserts that "[t]he bank statements reflect available cash throughout the entire year, whereas the 'cash' value purported on Schedule L of the U.S. Tax Returns, represents only the cash on hand at the time of reporting, therefore is not an ideal representation of the Petitioner's year-round liquidity and available cash assets." Counsel further asserts that the petitioner's bank statements from November 2008 through December 2011 reflect that the "[p]etitioner possessed additional liquid cash assets of over $29,000 in their bank account which were immediately available to support the ability to pay the proffered wage of $45,510, leaving a shortfall of approximately $16,500 to be covered by other assets."

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered in determining the petitioner's net current assets. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the AAO notes that even if the petitioner had shown that these amounts were additional funds, the average monthly balances stated by counsel are less than the proffered wage in each year.

Counsel asserts that the petitioner's lines of credit with and are assets available to meet the ability to pay requirement. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See John Downes and Jordan Elliot Goodman*, Barron's Dictionary of Finance and Investment Terms 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the

petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Counsel asserts that the discretionary compensation to officers is a financial resource available to the petitioner to meet its ability to pay requirement. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that two shareholders held 50 percent of the company's stock. According to the labor certification entity's 2009 IRS Form 1120 Schedule E (Compensation of Officers), the two shareholders elected to pay themselves $6,000 each, or $12,000 total. It is noted that the combined officer's compensation total of $12,000 would fail to cover the proffered wage of $45,510.40. According to the Schedule K-1 (Form 1065) for 2010, the two shareholders reflected a loss and failed to receive any compensation or income. Thus, in FY 2009 and calendar year 2010, officer's compensation was not sufficient to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

Counsel further asserts that the director failed to properly analyze the petitioner's ability to pay the beneficiary the proffered wage under the totality of the circumstances. Counsel contends that the merger of the labor certification entity into the petitioner "resulted in a general downturn in financial numbers in the short-term reporting period of 2009 leading up to the merger, as well as in 2010 when the merger took place." Counsel states that despite these setbacks, the company's reputation, long duration of the company's existence, and continued employment and payment of its workers

demonstrate that it is an ongoing business, and the temporary financial downturn is not indicative of ongoing financial difficulty.

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 claims to have been doing business since 2003. The petitioner's tax returns from 2008 to 2011 do not reflect sufficient net income or net current assets to pay the proffered wage in all but one year since the priority date. The petitioner did not provide any of its earlier tax returns to support its claim that the merger was the sole factor affecting its finances. There is insufficient evidence in the record of the historical growth of the petitioner's business. The gross sales amounts and total wages paid to all employees reflected on the petitioner's tax records do not reflect a steady increase over the years. While the record contains articles indicating the popularity and reputation of the company, the articles fail to outweigh the evidence presented in the tax returns. In addition, although counsel claims the merger resulted in a temporary financial downturn, no evidence was submitted in support of how the merger directly impacted the petitioner, or what income or assets were reallocated during the corporate restructuring that would have impacted the petitioner's financial position. The AAO notes that the petitioner's 2010 return lists a significant amount spent on "legal and professional fees;" however the labor certification entity's FY 2009 return lists a significantly lower amount for that category of expenses. Further, the petitioner did not submit any evidence to document that these amounts reflect costs of the merger. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). At the time of the priority date, the petitioner had been in business approximately five years; in the four years at issue since the priority date, the petitioner has reported negative net income and negative net current assets in two of the four years. While the petitioner's

2011 tax return reflects higher gross receipts, this growth occurred after the petitioner was created through the merger of multiple companies. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, even after the merger, the petitioner's finances have not increased a sufficient amount to demonstrate its ability to pay the proffered wage. While counsel asserts that the petitioner's payment of salaries is "clearly indicative of their ability to meet payroll obligations," the petitioner has not demonstrated its ability to pay the additional obligation of the beneficiary's proffered wage. In general, wages already paid to others are not available to prove the ability to pay the proffered wage to the beneficiary.

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 beneficiary the proffered wage beginning on the priority date onwards.

Beyond the decision of the director,[9] 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 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).

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook for [redacted][10] from April 2001 through April 2005, and as a cook for [redacted] from February 1993 through September 1995. The record of proceedings does not contain a letter from [redacted].

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 an employment letter from [redacted],

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[9] 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).

[10] The labor certification states that this business is "no longer in business."

owner of [redacted] restaurant, stating that the beneficiary worked as a cook from April 1, 2001 to April 30, 2005. While the letter provides a vague description of the job duties, the letter is not on company letterhead and fails to indicate whether the position was full or part-time. The letter also contains a misspelling of the restaurant's street address. In addition, a search of the New York State Corporate & Business Entity Database provides no results for the business. *See* (http://www.dos.ny.gov/corps/bus_entity_search.html accessed June 24, 2013).

The above discrepancies cast serious doubt on the credibility of the employment letter. Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. at 591. In any future filings, the petitioner must overcome these inconsistencies with independent, objective evidence.

Based on the above, 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 also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.