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 7 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) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. Upon denying the benefit request, the director erroneously stated that the appeal should be summited with a Form EOIR-29, contrary to 8 C.F.R. §103.3(a)(1)(iii). The petitioner ultimately filed an untimely appeal that is now before the Administrative Appeals Office (AAO) for review. An appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*). However, as a matter of administrative discretion, the AAO will consider the merits of the appeal on certification.[1]

The petitioner is a service station. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 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 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 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

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[1] Like any USCIS office, the AAO may avail itself of the certification process. *See* 8 C.F.R. § 103.4(a). As a matter of administrative discretion, the AAO may certify a decision to itself for review. The AAO limits this practice to cases involving exceptional circumstances; it "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations . . . ." *Matter of Jean,* 23 I&N Dec. 373, 380 n 9 (AG 2002). The present case, involving the director's violation of procedural regulations, warrants such review. The AAO is suspending the 30-day briefing period and will instead consider the petitioner's appellate brief. *See* 8 C.F.R. § 103.4(a)(3).

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 $18.09 per hour ($37,627.20 per year based on 40 hours per week). The Form ETA 750 states that the position requires a four year bachelor of science/art degree in an unspecified field and two years of experience in any supervisory position.

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 in 1996, to have a gross annual income of $4.39 million, and to currently employ 18 workers. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary claimed to have worked for the petitioner since February 1999.

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 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).

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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).

We note that the petitioner provided copies of its Forms 1120 for 2001 and 2002 with the petition. On September 25, 2006, the director submitted a request for evidence (RFE) seeking evidence of the petitioner's ability to pay the proffered wage from 2003 through the date of the RFE. The director also sought evidence of the beneficiary's qualifications for the proffered job. In response, the petitioner provided an experience verification letter from the beneficiary's past employer and Forms W-2 issued to the beneficiary in 2001, 2002 and 2003. However, the petitioner did not provide the requested federal income tax returns.

Counsel's letter in response to the RFE states that, "The petitioner is unable to produce all of the financial records beyond those previously submitted with respect to demonstrating the financial ability to pay the offered wage. The business continues to operated and is an on-going viable operation." No further explanation as to the unavailability of the petitioner's tax returns or other regulatory prescribed evidence of its ability to pay the proffered wage was submitted.

The AAO notes that the Forms W-2 submitted with the RFE response demonstrate that the beneficiary was paid $1,890 in 2001, $2,436 in 2002, and $1,428.25 in 2003. Therefore, the petitioner did not demonstrate that it paid the beneficiary the full proffered wage in any of the relevant years.

The AAO further notes that the Form W-2 issued in 2003 reflects a different Employer Identification Number (EIN) for the petitioner. The petition, the 2001 and 2002 Forms W-2, as well as the Forms 1120 in the record, list the petitioner's EIN as 52-1993366. The 2003 Form W-2 lists an EIN of 52-2128959. No explanation for this inconsistency is provided. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, the petitioner provided its federal income tax returns for 2004 through 2008. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The AAO also notes additional inconsistencies in the record. On May 20, 2013, the AAO notified the petitioner of intent to dismiss the instant appeal and of derogatory information (NOID). The AAO noted that, according to the Maryland Secretary of State, the petitioner's organization status was forfeited in December 2011. In response to the NOID, counsel states:

> Please be advised that the organization is still in business. On June 9, 2010, Slava Corporation was incorporated as a domestic organization. Before that date the organization was functioning as an international organization. The organization was reincorporated before the expiration date of December 11, 2011.

In support of counsel's assertions, the petitioner provides an affidavit from Mr. does not state his title in the affidavit, but the AAO notes that he signed the instant petition and listed his title as President on the Form I-140. Also in support of counsel's assertion are Articles of Incorporation for a Corporate Charter Approval Sheet; Certificates of Incorporation for Slava Corporation; state business licenses for Slava Corporation for 2010 through 2013, and; an undated printout from the Maryland Secretary of State website listing the status of as "Incorporated."

While the documents submitted in response to the AAO NOID demonstrate that is an organization in good standing in the state of Maryland, the assertions in the NOID response raise further questions. None of the documents submitted in response to the AAO NOID demonstrate the change from international to domestic organization, as claimed by the petitioner. The AAO notes that none of the tax returns in the record list a date of incorporation. Nor do any of the returns contain an indication that the petitioner was an international organization for any of the years presented. Form 1120, Schedule K, notes that if the corporation at any time during the tax year had assets or operated a business in a foreign country or U.S. possession, it may be required to attach a Schedule N. No Schedule N is included for any of the relevant years. In fact, tax returns show no evidence of submission to the Internal Revenue Service (IRS) or its receipt or acceptance by the IRS. The returns submitted by the petitioner do not include a signature or date from either the petitioner's representative or the tax preparer. 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)).

Additional inconsistenecies in the tax return are also noted. The petitioner claimed on the Form I-140 to employ 18 workers. However, on the petitioner's Forms 1120 it claims expenses for wages and salaries (Line 13) in the following amounts:

Year	Wages Claimed
2001	$33,090
2002	$34,236
2003	-
2004	$57,000
2005	$61,000
2006	$0
2007	$0
2008	$0

It is unlikely that the petitioner's tax returns and its claims to employ 18 people are both accurate. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 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, as noted above, the petitioner's federal income taxes are inconsistent and unreliable. The petitioner presented no evidence of its reputation in the industry or of any uncharacteristic business expenditures or losses. 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.

Beyond the decision of the director,[3] 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).

In the instant case, the labor certification states that the offered position requires four years of college culminating in a bachelor's degree in science/art. On the labor certification, the beneficiary claims to qualify for the offered position based on a bachelor of science degree in microbiology from Nigeria, completed in 1995. However, there is no evidence in the record to support this assertion. The petitioner did not provide a copy of the beneficiary's degree or statements of marks showing satisfactory completion of a bachelor's degree. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[3] 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).