

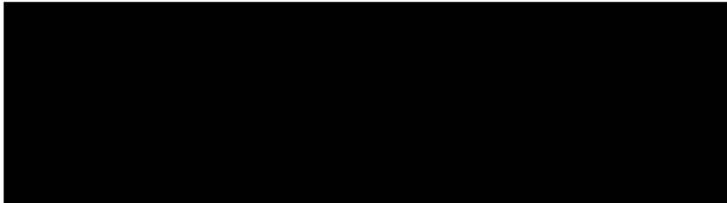
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U.S. Citizenship
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Services



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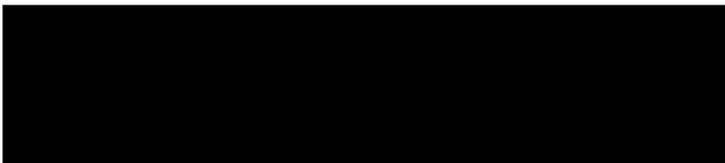
FILE: SRC 06 262 52271 Office: TEXAS SERVICE CENTER Date: FEB 02 2009

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, 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 is a distributor of laser components. It seeks to employ the beneficiary permanently in the United States as an account manager for Japan. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Alien Employment Certification, approved by the Department of Labor. 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 2006 priority date of the visa petition because the petitioner had not submitted any of the regulatorily-described evidence identified at 8 C.F.R. § 204.5(g)(2) to establish its 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.

As set forth in the director's September 30, 2006 denial, the primary 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. However, on January 29, 2008, the AAO in an RFE raised questions with regard to contradictions between the petitioner's payroll journals and check stub/statements submitted to the record, and on September 24, 2008, the AAO issued a Notice of Intent to Deny (NOID) the petition based on the petitioner failing to state on the ETA Form 9089 that the beneficiary was an individual partner who received five per cent of the petitioner's profits and capital. The AAO also raised questions with regard to whether the petitioner intended to employ the beneficiary in accordance with the hourly wage terms of the job offer, based on the petitioner's payment of monthly wages to the beneficiary. The AAO will also examine these issues in this proceeding.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel

records, may be submitted by the petitioner or requested by [U.S Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Permanent Employment Certification, was accepted for processing by the U.S. Department of Labor. *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 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on June 30, 2006. The proffered wage as stated on the Form ETA 750 is \$39.44 an hour or \$82,035.20 per year. The Form ETA 750 states that the position requires thirty-six months of work experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

The petitioner submitted unaudited Profit and Loss statements for January to December 2005 and a Balance Sheet statement as of December 31, 2005 with the initial I-140 petition. In response to the director's RFE dated September 8, 2006, the petitioner submitted a copy of the beneficiary's W-2 Wage and Tax Statement form for tax year 2005 that indicated the petitioner paid the beneficiary \$69,875 in tax year 2005. The petitioner also submitted copies of its payroll journals for January to August 2006 that indicated the petitioner paid the beneficiary \$5,375 a month during January to May 2006, and \$6,375 in June through August 2006.

On appeal, counsel submits a brief and a copy of the petitioner's Federal corporate tax return, Form 1065, U.S. Return of Partnership Income, for tax year 2005. The petitioner also submits a Form 7004, Application for Automatic 6-Month Period of Time to File Certain Business Income Tax, Information, and Other Returns, that indicates the petitioner requested an extension for filing its 2005 tax return. The petitioner also submits copies of the beneficiary's pay stubs for pay periods July 29, 2006 to August 11, 2006 and September 23, 2006 to October 6, 2006. The former pay stub indicates wages of \$6,375.80, while the latter pay stub (and accompanying check) indicates gross

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).

wages of \$6,375 and actual wages after withholding of \$4,969.69. The October 2006 pay stub indicates year to date earnings of \$58,750.

The AAO issued a Request for Evidence dated January 29, 2008 and noted that the check stub pay statements submitted on appeal showed two-week pay periods, while the previously submitted journal pages showed four-week pay periods with one unexplained irregular pay period. The AAO noted that while the petitioner paid the beneficiary \$6,735 for two four-week pay periods ending July 15, 2006 and August 11, 2006, the beneficiary's check stubs indicated that the petitioner paid the beneficiary gross pay of \$6,375 for two-week periods from July 29, 2006 to August 11, 2006 and September 23, 2006 to October 6, 2006.

The AAO notes that the pay periods shown on these check stubs did not conform to those shown on the payroll journal pages previously submitted and asked the petitioner to provide an explanation for the irregular and contradictory pay periods submitted to the record, and that the petitioner's explanation must be supported by independent objective evidence as required by *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). The AAO requested copies of the petitioner's 2005 and 2006 tax returns, and 2007 tax return if available, and requested that the petitioner submit IRS-certified tax returns. The AAO also requested that the petitioner submit the beneficiary's 2006 and 2007 W-2 Forms.

In its response to the AAO RFE, on April 17, 2008, the petitioner submitted its Forms 1065 for tax years 2005 and 2006, with an explanation that it had not received the IRS-certified copies of these tax returns within the period of time for response provided by the AAO. The petitioner also provided copies of the beneficiary's W-2 Form for tax years 2006 and 2007 that indicated the petitioner paid the beneficiary \$71,500 in tax year 2006 and \$76,500 in tax year 2007. In a document entitled "Irregular Pay Periods," [REDACTED], the petitioner's president, stated that the petitioner utilizes Paychex, a payroll company that only allows one pay period to be noted on all employee check stubs. [REDACTED] continued that all employees are paid every two weeks except the beneficiary who is paid one time a month during the pay period that most closely matches the middle of the month for the company's payday. [REDACTED] states that the beneficiary's checks are always issued in approximately the middle of the month for work for the pay period of the previous month, and that a paycheck for September that was issued on August 31, 2007 was issued approximately two weeks early at the request of the beneficiary. In subsequent correspondence dated July 1, 2008, counsel submits the IRS-certified tax returns for 2005 and 2006.

The AAO then issued a Notice of Intent to Deny (NOID) the petition dated September 24, 2008. In its NOID, the AAO noted that the petitioner's Forms 1065 for tax years 2005 and 2006 indicated on the respective Schedules K-1 that the beneficiary is an individual partner who receives five per cent of the petitioner's profits and capital. The AAO stated, that based on this information, the beneficiary has a financial interest in the partnership. The AAO noted that an occupational preference petition may be filed on behalf of a prospective employee who is a partner in the partnership; however, the prospective employee's interest in the partnership was a material fact to be considered in determining whether the job being offered was really open to all qualified applicants.

The AAO stated that the partner's concealment, in labor certification proceedings, of an interest in the petitioning entity constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d). The AAO also cited *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). The AAO noted that the petitioner's Form ETA 9089 specifically asks on page 1, Section C, question 9, whether the employer is a closely held corporation, partnership or sole proprietorship in which the beneficiary has an ownership interest, or whether there is a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the beneficiary. The AAO noted that the petitioner checked the box "no" in response to this question. The AAO noted that the failure to disclose the beneficiary's ownership would constitute willful misrepresentation, and that willful misrepresentation of a material fact in these proceedings might render the beneficiary inadmissible to the United States.²

The AAO also noted that the Form ETA 9089 indicated that the beneficiary was employed with [REDACTED] from April 8, 1998 to February 28, 1999 as the company's president, and that he was employed with [REDACTED] in Japan from October 1996 to March 1998 as a sales manager.³ The AAO requested that the petitioner indicate whether these two entities were related to the petitioner, and to explain the relationship between the businesses and the petitioner, if any existed. Further, the AAO requested that the petitioner explain whether the beneficiary held an ownership interest in the foreign corporations, if related to the petitioner.

The AAO then noted that a labor certification for a specific job offer is valid only for the particular job opportunity, and referred to 20 C.F.R. 656.30(c)(2). The AAO stated that based on the record it was not clear that the petitioner intended to employ the beneficiary in accordance with the terms of the job offer. The AAO noted that Form ETA 9089 provides that the petitioner will pay the beneficiary \$39.44 per hour, for an annual salary of \$82,035.20 based on a forty-hour workweek. The AAO noted that the petitioner indicated it paid the beneficiary his salary on a monthly basis, whereas all other employees are paid twice a month. The AAO then noted that the record was not clear that the petitioner intended to pay the beneficiary for work on an hourly basis, or whether the beneficiary is paid a different amount based on a separate agreement, or rather a formula or percent of the petitioners' gross profit, which might be less than the proffered wage of \$82,035.20 on an annual basis. The AAO cited to *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) that states in part it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence.

In response to the AAO's NOID, counsel submitted a letter from [REDACTED] dated October 16, 2008, and a copy of a corrected ETA Form 9089. Counsel stated that the petitioner did not provide a letter

² The AAO cited INA Section 212(a)(6)(c), [8 U.S.C. 1182, regarding misrepresentation which states, in pertinent part, "(i) in general, any alien who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

³ As stated previously, the Form ETA 9089 also indicates the beneficiary's later period of employment with [REDACTED] in Japan from March 1, 1999 to August 31, 1999.

perfect Form ETA 9089 when coupled with the certified tax returns voluntarily supplied by the petitioner. Counsel described the mistake on the petitioner's labor certification with regard to question nine on page 1, as an inadvertent clerical mistake and not any attempt at misrepresentation of any kind. Counsel states that she did not review each and every answer on the ETA 9089 with the petitioner's owner. Counsel also cites *Matter of HealthAmerica* (Board of Alien Labor Certification Appeals (BALCA) July 16, 2006, in which the court found the petitioner's mistake to be a typographical error and not intentional misrepresentation of the facts, where an employer submitted tear-sheets as evidence of the petitioner's actual recruitment. Counsel stated that the petitioner's president submitted IRS-certified tax returns as evidence of the beneficiary's interest in the petitioner, and that there was no attempt to hide or fabricate anything. Counsel notes that the petitioner submitted two sets of tax returns, the second of which were the certified copy of the tax returns issued by the IRS after the petitioner's original deadline to submit evidence in response to the director's RFE.

Counsel noted that the petitioner's president has made changes to the ETA Form 9089 and initialed in the margin indicating his willingness to correct his mistakes as soon as he is aware of them. Counsel states that the denial of the instant petition on the basis of a clerical mistake would be an acceptance of form over substance, and notes that the petitioner's Schedule K-1s openly declared the five per cent ownership interest, and were part of the petitioner's submission to the record.

In his letter, ██████ apologized for the error on question 9, Section C, of the Form ETA 9089. Mr. ██████ states that he is an entrepreneur with his own small start-up company and is in charge of all facets of the business. ██████ stated that when counsel asked him to review the draft, he had little time to review the Form ETA 9089 and therefore he missed the error on the Form ETA 9089. Mr. ██████ stated that if he had known of the typographical error, he would have made a quick correction before sending the returns, and that he now submits a corrected Form ETA 9089 for the previously submitted ETA Form 9089.

██████ stated that the petitioner has expanded to fourteen workers and it has a real need for a person to fill the proffered job. ██████ noted that the petitioner's difficulty in finding an employee for the proffered position stemmed from the fact that the petitioner is a niche business in a highly competitive market and the petitioner relies on market knowledge, experience and direct customer relationship to conduct its export business in Japan.

██████ stated that the beneficiary is not related to him, and that his work responsibility was mostly limited to the development of new business on behalf of the petitioner in Japan. ██████ stated that the job required frequent travel to Japan and even when the beneficiary is in the United States, the beneficiary often put in many of his working hours from home to better overlap with his customer base in Japan. ██████ stated that the beneficiary holds a minimal and insignificant ownership interest in the company and that ██████ and his wife have the remaining 95 per cent interest. He stated that the beneficiary's ownership interest did not affect how the petitioner recruited for the position, and that the petitioner made sure there was a real job opportunity for qualified Americans. ██████ stated that the petitioner outsourced the recruitment to a local firm, but that the petitioner was unable to find an applicant with the combination of skills, knowledge, and experience.

██████████ stated that with regard to the Japanese company, ██████████, neither he nor the petitioner has any share in this entity and that New Source Japan, Inc. has no share in the petitioner.

██████████ also stated that ██████████ is not legally connected to the petitioner in a parent-subsidary relationship. ██████████ states that to the best of his knowledge, ██████████ was deactivated around the end of 1999 and only recently activated in 2007. With regard to the beneficiary's claimed employment with the petitioner listed on the ETA Form 9089 as October 1, 1996 to March 31, 1998 (and March 1, 1999 to August 31 1999), ██████████ stated that the beneficiary performed sales and marketing tasks in Japan on behalf of the petitioner while in Japan. The beneficiary presented himself to prospective clients under the petitioner's name and with a proper title as if the petitioner had an office in Japan in order to explore potential business opportunities. ██████████ noted that there has never been a ██████████ business registered in Japan, and that the petitioner was established as a limited liability company in the state of California and has only had a single California-based office.

With regard to the payroll, ██████████ states that all full-time and part-time employees are paid every two weeks, as is the beneficiary, and that he and his wife are the only individuals now not receiving pay every other week. ██████████ stated that at one time, the beneficiary requested accommodation in the issuance of his paychecks due to his travels; however this is no longer true. ██████████ stated that the beneficiary is being paid his full salary as a regular employee, with a paycheck issued every other week. ██████████ also noted that the beneficiary is eligible to receive a share of the petitioner's profit, based on his five percent ownership.

Counsel also submits a copy of the petitioner's ETA Form 9089 with question 8, Section C corrected to read "Yes" with regard to the beneficiary having an ownership interest in the petitioner. This correction is signed by ██████████ and dated October 18, 2008.

The evidence indicates that the petitioner is a partnership. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$2.6 million, a net annual income of \$380,000, and to currently employ seventeen workers. On the Form ETA 9089, signed by the beneficiary on July 27, 2006, the beneficiary claimed to have worked for the petitioner from January 1, 2002 to December 31, 2006. The beneficiary also claimed that he worked for ██████████, Kanagawa, Japan, as Sales Manager from October 1, 1996 to March 31, 1998 and from March 1, 1999 to August 31, 1999. In between these two periods of employment, the beneficiary indicated that he had worked at ██████████, Kanagawa, Japan, as president from April 8, 1998 to February 28, 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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 Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U. S.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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. At the time of filing the instant petition, the petitioner had not filed its 2005 federal tax return; however, the petitioner submitted the 2005 tax return on appeal with an explanation that the 2005 tax return had only been filed in October 2006.⁴ On appeal, the petitioner also submitted its 2006 tax return.⁵ In the instant case, the petitioner has established that it employed and paid the beneficiary \$76,500 in tax year 2005, \$71,500 in tax year 2006, and \$76,500 in tax year 2007.⁶ Neither sum is sufficient to establish that the petitioner paid the beneficiary the proffered wage of \$82,035.20 as of the 2006 priority date and to the present time. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2005 and 2006.

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. 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.

⁴ The IRS certified tax return indicates the tax return was signed on October 15, 2006. It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's request for further evidence dated September 18, 2006. At this time, the petitioner's 2005 income tax return would not have been available. The AAO notes that the petitioner's 2005 tax return does not include the priority date of June 30, 2006; however it was the petitioner's most recent tax return at the time the petitioner filed the I-140 petition.

⁵ The petitioner submitted its tax returns for both 2005 and 2006 in its response to the AAO's RFE.

⁶ The beneficiary, as a five per cent business partner, also received \$17,976 in 2005 and \$1,857 in tax year 2006 as his share of the petitioner's income. Unlike the petitioner's other two partners, the beneficiary did not receive any guaranteed payments, based on the information contained on the petitioner's Schedules K for the relevant years.

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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. at 537.

For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 22 of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (Accessed January 29, 2009). In the instant case, the petitioner's Schedule K has relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant matter, the petitioner's Schedules K for both 2005 and 2006 reflect additional income, guaranteed payments and deductions. Therefore the AAO will utilize Line 1, of the Analysis of Net Income of Schedule K section, page 4 of IRS Form 1065 for these two years⁷.

The petitioner's tax returns for 2005 and 2006 show the amounts for net income on Schedule K as shown in the table below:

Tax Year	Net Income	Wage increase needed to pay the proffered wage	Surplus or deficit
2005	\$526,083	\$5,535.20	\$520,547.80
2006	\$228,612	\$10,535.20	\$218,076.80

With regard to tax years 2005 and 2006, the petitioner has established that it had the ability to pay the difference between the beneficiary's actual wages and the proffered wage based on its net

⁷ The petitioner did not submit its Form 1065 for tax year 2007. Therefore, the AAO will not discuss further the petitioner's ability to pay the proffered wage in tax year 2007.

income. The AAO also notes that while the petitioner's net income decreased in tax year 2006, the petitioner's wages and salaries paid to employees increased significantly. Thus the petitioner has established its ability to pay the proffered wage in the relevant period of time.

However, the AAO raised questions in its NOID with regard to the beneficiary having a financial interest in the petitioner and whether the petitioner actually intended to provide U.S. workers a valid opportunity to apply for the proffered position. In particular, the AAO questioned the documentation of varying pay periods for the beneficiary, and questioned the beneficiary's relationship to a business located in Japan with the same name as the petitioner, as well as the petitioner's relationship with another business in Japan.⁸

The AAO views the issue of varying payroll amounts to have been resolved by the petitioner's evidence submitted in response to the AAO NOID. Further, it does not regard this issue as the most material issue in this proceeding. Of more importance is whether the petitioner would offer any U.S. workers applying for the position the same five per cent interest in the petitioner, or whether this job incentive was provided only with regard to the beneficiary based on a preexisting relationship with the petitioner.

The petitioner submits a letter from its president that asserts the beneficiary is not related to the petitioner's other partners, and that the petitioner had no shares in [REDACTED], a company in Japan for which the beneficiary had been the president. The petitioner's president also states that New Source Japan, Inc. had no shares in the petitioner. With regard to the work identified on the petitioner's Form ETA 9089 performed by the beneficiary for the petitioner, the petitioner's president asserted that the beneficiary just used the petitioner's name and a title to promote business opportunities for the petitioner in Japan. However, the assertions of counsel, and by extension, the petitioner's president, 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). The petitioner's president provided no further evidentiary documentation to support his assertions with regard to the ownership and officers and shareholders of either Japanese company. Of more probative weight would be documentation such as articles of incorporation or similar legal establishment of the Japanese companies in Japan, and the incorporating officers/shareholders.

With regard to the beneficiary's established five per cent interest in the petitioner, the AAO acknowledges that such a payment does not establish that the petitioner's officers are related, or that the beneficiary exercises any majority shareholder control over the petitioner. It does suggest, however, that the relationship between the petitioner's remaining shareholders and the beneficiary are not strictly that of employer and employee. The AAO also views the petitioner's owner's description of the beneficiary's work for it from March 1, 1999 to August 31, 1999 in Japan as "performing marketing tasks" and using the company name and title to be more convincing to potential Japanese clients to be inconsistent with the ETA 9089 that indicates the beneficiary worked for the petitioner in Japan fulltime from March 1, 1999 to August 31, 1999. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any

⁸ This business is [REDACTED]. On the petitioner's Form ETA 9089, the beneficiary is identified as president of this company from April 8, 1998 to February 28, 1999.

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.”

Furthermore, with regard to the amended Form ETA 9089 submitted by the petitioner to the record, the AAO notes that 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. 1986). *See also, Mandany 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). These limitations on changes to the terms of the labor certification application apply equally to the petitioner. While the petitioner could have changed the terms of the labor certification prior to its certification by DOL, it may not change the terms of the labor certification after it has been certified by DOL. Therefore the AAO does not accept the petitioner’s amended Form ETA 9089 as persuasive evidence.

Thus, the AAO finds that the petitioner has not provided sufficient evidence to answer the questions raised in the AAO NOID, and thus, the validity of the proffered position is not established in the record. Thus, the petition will be denied. The appeal is dismissed.

The burden of proof in these proceedings rests solely 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.