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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN 07 146 51088

Date:

SEP 03 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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, 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a civil engineer technician. 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. Specifically, he director determined that the petitioner had not established its ability to pay the proffered wage in 2005, and that it had not established the ability of its predecessor to pay the proffered wage in 1999, 2000, 2001, 2002, 2003, 2004 and 2005. 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 February 5, 2008 denial, the primary issue in this case is whether or not the petitioner or its predecessor 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, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 16, 1999. The proffered wage as stated on the Form ETA 750 is \$50,000.00 per year.

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 appeal.¹ On appeal, the petitioner's former counsel² submits a brief; a letter dated September 21, 2004, from SRC Construction Corporation of NJ; a letter dated June 8, 2006, from the petitioner; a document dated November 2, 2005, between SRC Construction Corp. of NJ and the petitioner which states that "all employees that once belonged to SRC will now be the employees" of the petitioner; a letter dated March 3, 2008, from the petitioner which states that the petitioner "is not a successor in interest to SRC Construction Corporation of New Jersey," that the beneficiary has been employed with the petitioner as a construction manager since November 2005, and that the petitioner "desires to continue to employ [the beneficiary] as a Construction Manager;" paystubs issued by the petitioner to the beneficiary in March 2008; the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2005, 2006 and 2007; the first pages of IRS Forms 1120, U.S. Corporation Income Tax Return, for SRC Construction Corp. of NJ for 2001, 2002 and 2003; a payroll record for SRC Construction Corp. of New York for the period ending December 24, 2000; the first page of Form 1120S, U.S. Income Tax Return for an S Corporation, for SRC Construction Corp. of NY for 1999; IRS Form W-2 issued by the petitioner to the beneficiary in 2005, 2006 and 2007; IRS Forms W-2 issued by SRC Construction Corp. of NJ to the beneficiary in 2001, 2002, 2003, 2004 and 2005; IRS Forms W-2 issued by SRC Construction Corp. of NY to the beneficiary in 1999, 2000 and 2001; and a memorandum dated September 12, 2006, from Michael Aytes, Acting Associate Director, Domestic Operations, United States Citizenship and Immigration Services (USCIS), regarding revisions to Chapter 22 to the Adjudicator's Field Manual (AFM). Other relevant evidence in the record includes a letter dated October 15, 2007, from the petitioner; paystubs issued by the petitioner to the beneficiary in 2007; the petitioner's Articles of Incorporation; the petitioner's Certificate of Existence issued by the Nevada Secretary of State; the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The petitioner's former counsel withdrew his appearance as counsel for the petitioner by letter dated March 13, 2009.

petitioner's Connecticut contractor's license; and the petitioner's bank statements for July 2007.³ The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on July 21, 2005, to have a gross annual income of \$2,000,000.00 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 8, 1999, the beneficiary did not claim to have worked for the petitioner.

The original applicant on the Form ETA 750 was SRC Construction Corp. of New York. The petitioner was substituted as the applicant on the Form ETA 750 prior to its certification by the DOL on March 6, 2007. In his decision denying the petition, the director determined that the petitioner had not established its ability to pay the proffered wage in 2005, and that it had not established the ability of its predecessor to pay the proffered wage in 1999, 2000, 2001, 2002, 2003, 2004 and 2005. On appeal, the petitioner's former counsel argues that substitution of the employer on a Form ETA 750 by the DOL tolls the ability to pay requirement, and that the petitioner has established its ability to pay the proffered wage from the date it was substituted as the employer on the Form ETA 750. The petitioner's former counsel cites a Board of Alien Labor Certification Appeals (BALCA) case, *Matter of American Chick Sexing Association and ACCU-CO*, 89-INA-320 (BALCA 1991), in support of his proposition.⁴

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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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).

³ 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. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

⁴ The petitioner's former counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The regulation at 20 C.F.R. § 656.30(c)(2) provides that a labor certification application is valid only if the particular job opportunity and the area of intended employment remain the same. In general, a change in employers requires a new application for certification by the new employer unless the same job opportunity and the same area of intended employment are preserved. A change in employers does not necessarily require the filing of a new application where the alien is working in the exact same position, performing the same duties, and in the same area of intended employment for the same salary or wage. *See International Contractors, Inc., and Technical Programming Services, Inc.*, 89-INA-278 (BALCA 1990); *Matter of American Chick Sexing Association and ACCU-CO*, 89-INA-320 (BALCA 1991). In *American Chick Sexing Association*, BALCA determined that 20 C.F.R. § 656.30(c)(2) is not violated where one company timely transfers its interests in labor certification applications to another company, and the successor company preserves the particular job opportunities and area of intended employment. BALCA did not determine, however, that such a transfer would toll the ability to pay requirement of 8 C.F.R. § 204.5(g)(2), which clearly requires that a petitioner demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.⁵ The petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date and continuing until the transfer of its interest in the labor certification to the petitioner. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish its financial ability to pay the certified wage from the date of the transfer. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, the petitioner submits a document dated November 2, 2005, between SRC Construction Corp. of NJ and the petitioner that “all employees that once belonged to SRC will now be the employees” of the petitioner. However, the original applicant on the Form ETA 750 was SRC Construction Corp. of New York. The AAO sent a Notice of Derogatory Information (NDI) to the petitioner on February 24, 2009. The AAO stated that the document submitted on appeal does not establish that the petitioner was properly substituted for SRC Construction Corp. of New York, as SRC Construction Corp. of NJ and SRC Construction Corp. of New York are separate and distinct companies.⁶

Further, pursuant to a letter submitted on appeal dated March 3, 2008, the petitioner states that it “is not a successor in interest to SRC Construction Corporation of New Jersey,” that the beneficiary has been employed with the petitioner as a construction manager since November 2005, and that the petitioner “desires to continue to employ [the beneficiary] as a Construction Manager.”⁷ However, the Form ETA 750 was certified for a civil engineering technician, not a construction manager. In addition, the original applicant on the Form ETA 750 was located in New York, and the petitioner is located in New

⁵ The petitioner was incorporated in July 2005, nearly six years *after* the priority date.

⁶ Tax returns for SRC Construction Corp. of NJ indicate that it was incorporated on January 19, 2000, and a tax return for SRC Construction Corp. of New York indicate that it was incorporated on September 6, 1994. The companies have separate federal employer identification numbers and different addresses.

⁷ A separate letter in the record dated July 12, 2006 from the petitioner states that the petitioner “is pleased to offer [the beneficiary] a permanent position as a Civil Engineer.”

Jersey. As set forth above, the regulation at 20 C.F.R. § 656.30(c)(2) provides that a labor certification application is valid only if the particular job opportunity and the area of intended employment remain the same. Thus, the AAO noted in its NDI that it appears that the petitioner plans to employ the beneficiary in a different position and in a different area than those certified on Form ETA 750, in violation of 20 C.F.R. § 656.30(c)(2).⁸

The NDI asked the petitioner to provide documentation to establish that it was properly substituted for SRC Construction Corp. of New York on Form ETA 750, and that it has offered the same job opportunity and the same area of intended employment as listed on the Form ETA 750. The NDI also asked the petitioner to provide a complete copy of the Form ETA 750 as certified by the DOL, including any documentation regarding the amendment of the applicant on the Form ETA 750 from SRC Construction Corp. of New York to Accubuild Construction Inc.⁹ The NDI further asked the petitioner to provide a copy of all supporting documents detailing the job opportunity and the area of intended employment as previously presented to DOL.

In response to the NDI, the petitioner states that the beneficiary was originally hired by SRC Construction Corp. of NY in August 1998, and that in June 2001, SRC Construction Corp. of NY “ceased its operation.” The petitioner states that a new company, SRC Construction Corp. of NJ, was incorporated by the same owner, [REDACTED] and that the beneficiary began similar employment with SRC Construction Corp. of NJ in June 2001. The petitioner further states that SRC Construction Corp. of NJ shut down in November 2005, and the beneficiary thereafter began employment with the petitioner. The petitioner asserts that the beneficiary has been employed as a civil engineer throughout his periods of employment with SRC Construction Corp. of NY, SRC Construction Corp. of NJ and the petitioner. The petitioner states that the locations of the beneficiary’s employment have all been within the same Standard Metropolitan Statistical Area (SMSA).¹⁰ The petitioner states that it amended the ETA 750 on February 5, 2007,¹¹ and that the DOL approved the amendments and certified the ETA 750 on March 6, 2007.

⁸ 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).

⁹ Pursuant to section 204(b) of the Act, USCIS investigates the facts of each case in consultation with DOL. Under DOL’s regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d). A finding of misrepresentation may lead to invalidation of the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d).

¹⁰ It appears that the petitioner plans to employ the beneficiary in the same position and in the same area as those certified on Form ETA 750.

¹¹ The petitioner failed to submit the Notice of Findings (NOF) issued by the DOL on January 6, 2007, and its response to the NOF, as referenced in its response to the NDI. 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).

Further, the AAO noted in the NDI that the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date and continuing until the purported transfer of its interest in the labor certification to the petitioner. The record contains the first page of Form 1120S, U.S. Income Tax Return for an S Corporation, for SRC Construction Corp. of New York for 1999. However, the remaining pages of the tax return were not provided. The NDI asked the petitioner to provide annual reports, federal tax returns, or audited financial statements for SRC Construction Corp. of New York for 1999 through 2007.¹² In response, the petitioner states that it is unable to provide the requested documents as the company is no longer in operation.

As previously discussed, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date and continuing until the transfer of its interest in the labor certification to the petitioner. Moreover, the petitioner must establish its financial ability to pay the certified wage from the date of the transfer. The DOL accepted the substitution of the petitioner for SRC Construction Corp. of New York on the Form ETA 750 on March 6, 2007. Thus, the petitioner must establish the financial ability of SRC Construction Corp. of New York to have paid the certified wage at the priority date on February 16, 1999, and continuing until the transfer of its interest in the labor certification to the petitioner on March 6, 2007. Moreover, the petitioner must establish its financial ability to pay the certified wage from the date of the transfer. However, according to the petitioner, SRC Construction Corp. of NY ceased its operations in June 2001. The petitioner states that SRC Construction Corp. of NJ, was incorporated by the same owner, [REDACTED], and that the beneficiary began similar employment with SRC Construction Corp. of NJ in June 2001. The petitioner has not established that SRC Construction Corp. of NJ is the same company or a successor-in-interest to SRC Construction Corp. of NY.¹³ Further, the petitioner states that SRC Construction Corp. of NJ shut down in November 2005, and that the beneficiary thereafter began employment with the petitioner. Thus, the predecessor company ceased operations over one year prior to the substitution of the petitioner on the ETA 750. For these reasons, the petitioner has not established the ability of the predecessor enterprise to have paid the certified wage at the priority date and continuing until the transfer of its interest in the labor certification to the petitioner.

¹² We note that the director previously requested evidence of the predecessor's ability to pay in his Notice of Intent to Deny dated September 26, 2007. The director also requested evidence of the petitioner's ability to pay the proffered wage in a Request for Evidence dated July 31, 2007.

¹³ If the original employer is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In addition, in order to maintain the original priority date, the successor-in-interest must demonstrate that the original employer had the ability to pay the proffered wage from the priority date until the date of the change in ownership. Moreover, the successor-in-interest must establish its financial ability to pay the certified wage from the date of the change in ownership. See *Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981).

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 beneficiary's IRS Forms W-2 demonstrate that he was employed by SRC Construction Corp. of NY in 1999, 2000, 2001; that he was employed by SRC Construction Corp. of NJ in 2001, 2002, 2003, 2004, and 2005; and that he was employed by the petitioner in 2005, 2006, 2007 and 2008. The Forms W-2 indicate that SRC Construction Corp. of NY paid the beneficiary \$22,705.32, \$28,601.72 and \$15,449.50 in 1999, 2000 and 2001, respectively. The Forms W-2 indicate that SRC Construction Corp. of NJ paid the beneficiary \$13,802.84, \$28,324.00, \$29,341.21, \$31,304.00 and \$14,630.00 in 2001, 2002, 2003, 2004, and 2005, respectively. The Forms W-2 indicate that the petitioner paid the beneficiary \$7,092.20, \$34,968.19, \$51,349.50 and \$52,132.00 in 2005, 2006, 2007 and 2008, respectively. The proffered wage as stated on the Form ETA 750 is \$50,000.00 per year. Thus, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2007 and 2008.

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). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that

depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[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 tax returns in the record demonstrate the net income for SRC Construction Corp. of NY and SRC Construction Corp. of NJ, as shown in the table below.

- In 1999, the Form 1120S stated net income¹⁴ for SRC Construction Corp. of NY of \$237,058.
- In 2001, the Form 1120S stated net income for SRC Construction Corp. of NJ of -\$85,394.
- In 2002, the Form 1120S stated net income for SRC Construction Corp. of NJ of -\$92,521.
- In 2003, the Form 1120S stated net income for SRC Construction Corp. of NJ of -\$61,524.

Therefore, even if we assume that SRC Construction Corp. of NJ was a successor-in-interest to SRC Construction Corp. of NY, the petitioner has not established the ability of SRC Construction Corp. of NY to pay the proffered wage in 1999, 2000, and from January 1, 2001 to June 2001, when it ceased operations. Further, the petitioner has not established the ability of SRC Construction Corp. of NJ to pay the proffered wage from June 2001 to December 31, 2001, 2002, 2003, 2004, 2005, 2006, and

¹⁴ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 3, 2009) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner did not submit Schedule K to the tax returns for SRC Construction Corp. of NY and SRC Construction Corp. of NJ, the AAO is unable to determine if either entity had additional income, credits, deductions, or other adjustments shown on its Schedule K for any relevant year. The figures stated for net income represent the figures listed at line 21 of Forms 1120S.

from January 1, 2007 to March 6, 2007, the date of the transfer of the interest in the labor certification to the petitioner.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner did not provide Schedule L to the tax returns of SRC Construction Corp. of NY or SRC Construction Corp. of NJ. Therefore, even if we assume that SRC Construction Corp. of NJ was a successor-in-interest to SRC Construction Corp. of NY, the petitioner has not established the ability of SRC Construction Corp. of NY to pay the proffered wage in 1999, 2000, and from January 1, 2001 to June 2001, when it ceased operations. Further, the petitioner has not established the ability of SRC Construction Corp. of NJ to pay the proffered wage from June 2001 to December 31, 2001, 2002, 2003, 2004, 2005, 2006, and from January 1, 2007 to March 6, 2007, the date of the transfer of the interest in the labor certification to the petitioner.

The petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date and continuing until the transfer of its interest in the labor certification to the petitioner.

Beyond the decision of the director,¹⁶ another issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 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).

¹⁵According 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.

¹⁶ 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of civil engineer technician. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	blank
	High School	blank
	College	blank
	College Degree Required	BACHELOR CIVIL ENGINEERING
	Major Field of Study	blank

The applicant must also have eight years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked 35 hours per week as a civil engineer for SRC Construction Corp. of NY from November 1998 to the date he signed the Form ETA 750B on February 8, 1999. He further represented that he worked 40+ hours per week as a civil engineer for Agricultural Development Bank in Nepal from November 1988 to August 1996, and that he worked 40 hours per week as a civil engineer for Biswas Garment Factory in Nepal from 1993 to 1997.¹⁷ A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The regulation at 8 C.F.R. § 204.5(i)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

With the petition, the petitioner submitted a letter dated January 16, 1998, from the Division Chief of Agricultural Development Bank in Nepal, stating that the beneficiary was employed as a civil

¹⁷ The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, he did not list any employment.

engineer from April 1988 to March 1996.¹⁸ The petitioner also submitted a letter dated December 4, 2006 from [REDACTED] of SRC Construction Corporation, located in Fort Lee, New Jersey, indicating that the beneficiary “was employed as a Civil Engineer with SRC Construction Corp. from October 1998 to June 2006.”

Regarding the beneficiary’s employment before the priority date, the record also contains the following documentation: (1) a letter dated September 21, 2004 from [REDACTED] of SRC Construction Corporation of NJ,¹⁹ located in Fort Lee, New Jersey, indicating that the beneficiary was employed by SRC Construction Corp. of NY in July 1998, and that the beneficiary was later employed by SRC Construction Corp. of NJ; and (2) the beneficiary’s resume indicating that he worked as a civil engineer for Agricultural Development Bank in Nepal from April 1988 to March 1996, that he worked as a civil engineer/construction manager for SRC Construction Corp. in Fort Lee, New Jersey from July 1998 to June 2006, and that he worked as a civil engineer/construction manager for the petitioner from July 2006 to the date of the resume.²⁰

The NDI stated that the evidence does not sufficiently establish that the beneficiary had eight years of experience in the proffered job of civil engineer technician as of the priority date, February 16, 1999. Because the work experience letters provided with the petition are inconsistent with other information in the record, the NDI asked the petitioner to provide independent, objective evidence of the beneficiary’s former employment with Agricultural Development Bank and SRC Construction Corp. of New York. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The AAO noted that such evidence may include pay stubs, tax documents, financial statements or other evidence of payments made to the beneficiary by his previous employers during his periods of employment that precede the priority date.²¹

Further, on Form ETA 750B, the beneficiary represented that he worked 40 hours per week as a civil engineer for Biswas Garment Factory in Nepal from 1993 to 1997. The NDI asked the petitioner to

¹⁸ The letter does not confirm the beneficiary’s full-time employment, does not clarify the name of the letter’s signer and does not list the beneficiary’s duties as a civil engineer. The NDI asked the petitioner to provide a letter of experience relating to this employment consistent with the regulation at 8 C.F.R. § 204.5(1)(3). The AAO also noted that this letter conflicts with the beneficiary’s representation on Form ETA 750B that his employment with Agricultural Development Bank began in November 1988 and ended in August 1996.

¹⁹ The AAO noted in the NDI that the letterhead for SRC Construction Corporation of NJ differs from the letterhead used in the letter dated December 4, 2006, from SRC Construction Corporation. The AAO noted that the companies appear to be separate and distinct entities. The NDI asked the petitioner to explain the relationship between SRC Construction Corporation, SRC Construction Corporation of NJ and SRC Construction Corp. of New York. In response, the petitioner indicates that SRC Construction Corporation and SRC Construction Corporation of NJ are the same company.

²⁰ The beneficiary’s resume does not list his employment with Biswas Garment Factory.

²¹ 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. *Id.* at 591.

provide a letter of experience relating to this employment consistent with the regulation at 8 C.F.R. § 204.5(l)(3). In addition, as set forth on Form ETA 750B, the AAO noted that the beneficiary appears to have worked two jobs simultaneously for approximately three years, working 80+ hours per week from 1993 to August 1996. Therefore, the NDI asked the petitioner to detail the beneficiary's weekly work schedule during this period.

In response to the NDI, the petitioner attempts to explain the beneficiary's past work history:

After graduating in 1987, [the beneficiary] started his first job as a Civil Engineer for the Agricultural Development Bank of Nepal (ADBN hereon after), a semi-governmental organization in Nepal. His employment at ADBN lasted 8 years (April 1988 to March 1996), as stated on the letter provided by the Division Chief of the ADBN. [The beneficiary's] employment from 1993 to 1996 did not add 40+ work hours [sic] his schedule. He worked for Biswas Garment Factory during that period as a part time, freelance Civil Engineer, which included after work hours (5-6 total hours on weekdays) and sometimes the weekends. As he left ADBN on March 1996, [the beneficiary] took the job with Biswas Garment factory which lasted until October of 1997 as a Civil Engineer working 40+ hours a week.

The petitioner also states that the beneficiary's "employment with ABDN was a full time job, which required him to work 7 hours, 10AM to 5PM from Sunday to Friday making 40+ hours work week." However, the petitioner failed to provide independent, objective evidence of the beneficiary's former employment with Agricultural Development Bank and SRC Construction Corp. of New York as requested in the NDI. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 petitioner has not resolved the inconsistencies in the record and, therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Finally, the AAO noted in the NDI that the record demonstrates that SRC Construction Corp. of New York filed three Forms I-129, Petition for a Nonimmigrant Worker, on behalf of the beneficiary pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The original petition, changing the beneficiary's status from B-1 nonimmigrant status to H-1B nonimmigrant status, was approved by the director on October 30, 1998, valid from October 16, 1998 to July 15, 2001. The second petition, extending the beneficiary's H-1B nonimmigrant status, was approved by the director on November 28, 2001, valid from July 16, 2001 to July 15, 2004. The third petition, extending the beneficiary's H-1B nonimmigrant status, was approved by the director on August 23, 2004, valid from July 15, 2004 to July 15, 2005. However, the petitioner has indicated that SRC Construction Corp. of NY ceased its operations in June 2001. Thus, SRC Construction Corp. of NY was not eligible to file the two Form I-129 petitions extending the beneficiary's H-1B nonimmigrant status beyond June 2001. The two Form I-129 H-1B approvals are subject to revocation.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.²² 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.

²² When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.