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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**

B.G.



AUG 04 2010

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 sportswear retailer. It seeks to employ the beneficiary permanently in the United States as a store manager pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). 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 marriage fraud bar under section 204(c) of the Act applies to the case. The director also determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

A Form I-130, Petition for Alien Relative (Form I-130), was filed on the beneficiary's behalf on April 18, 2005. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary and a copy of a marriage certificate between the beneficiary and [REDACTED]

In connection with the Form I-130, a decision was issued by the Officer-in-Charge of the U.S. Citizenship and Immigration Services (USCIS) office located in Jacksonville, Florida on August 1, 2005. The decision denied the Form I-130 because the petitioner, [REDACTED] had admitted during an interview conducted in connection with the Form I-130 petition that she had married the beneficiary solely so he could remain in the United States. In addition, [REDACTED] signed a statement admitting that her marriage to the beneficiary was entered into for the purpose of obtaining permanent residency for the beneficiary. Specifically, the statement reads, in part, "Married due to the cause for him to get his greencard."

Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)¹ no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or

¹ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

(2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The instant Form I-140 petition was filed on November 1, 2006. On November 15, 2007 the director issued a Notice of Intent to Deny (NOID) the petition based, in part, on section 204(c). The director also provided a copy of the statement written and signed by [REDACTED] at the time of her interview. The statement reads:

Married due to the cause for him to get his green card. We have never consummated the marriage. Never got any recompensation [sic]. I make this voluntarily, and it is a true statement.

The director notified the petitioner that it had 35 days to submit a rebuttal to the adverse information. In response prior counsel submitted a letter which stated, in part, "we appreciate the notice from your Office and we will simply have to hope that the present case is as unaffected by this prior filing as possible and that the beneficiary is able to overcome this adversity."

The form I-140 petition was denied on March 17, 2008.

In support of the instant appeal, counsel has submitted a brief, an affidavit from the beneficiary, and additional evidence. However, as noted above, the petitioner failed to submit evidence in response to the NOID issued on November 15, 2007. 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 NOID. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

However, as discussed below, even assuming the evidence submitted on appeal were accepted, the AAO would find that the record contains substantial and probative evidence that the beneficiary entered into a marriage for the purpose of evading the immigration laws.

As noted above, the record contains a written statement from [REDACTED] that she married the beneficiary so that he could "get his green card."

On appeal, counsel submitted an affidavit from the beneficiary. In it, the beneficiary states that he intended to establish a life with [REDACTED]. He states that, at the time of the marriage, [REDACTED] was attending school in Miami and, therefore, he suggested that [REDACTED] rent a house in Miami. The beneficiary notes that he spent most of his time in St. Augustine, Florida and that he rented an apartment there.

The beneficiary further states, prior to the marriage, he knew that [REDACTED] "liked women." Following the marriage, according to the beneficiary, [REDACTED] "told me that she was who she was but she still loved me and we tried to work things out." However, according to the beneficiary, two days prior to the interview [REDACTED] "came to my apartment with her girlfriend and told me that she was who she was." The beneficiary states that he still "wanted to save the marriage."

The beneficiary further states that, at the August 1, 2005 interview with USICS, [REDACTED] "came out crying and told me the pressure was too great and that she just wanted out of the room and wrote whatever the officers told her."

The beneficiary's affidavit is inconsistent with the signed statement by [REDACTED] made at the time of her interview with USCIS. 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). As explained below, the evidence in the record is insufficient to resolve the inconsistencies between the statements of the beneficiary and [REDACTED]

Specifically, the record of proceeding contains the following relevant evidence:

- A copy of the marriage record for [REDACTED] and [REDACTED]
- Copies of four checks on which are printed the names [REDACTED] and [REDACTED]. All of the checks appear to have been signed by the beneficiary. Therefore, although these checks are evidence of a joint account between the beneficiary and [REDACTED] the checks do not provide evidence that [REDACTED] ever used the joint account or that they intended to establish a life together.
- Copies of bank statements covering the period May, 2005 to October, 2005. Only the name [REDACTED] appears on the bank statements. As [REDACTED] name does not appear on the bank statements, and there is no evidence that [REDACTED] used the account, these statements are not probative of whether the beneficiary and [REDACTED] intended to establish a life together.
- A lease, submitted in support of the Form I-130 petition, which covers the period June 1, 2005 to December 1, 2005. The address is listed as [REDACTED] St. Augustine, FL. [REDACTED] and [REDACTED] are listed as the residents. It is noted that this document is not signed by either [REDACTED] or [REDACTED]
- A copy of a lease, submitted in support of the instant appeal, which covers the period May 9, 2005 to June 30, 2006. The address is listed as [REDACTED] Miami, FL. [REDACTED] is listed as the resident and [REDACTED] is listed as the occupant. The lease bears only one signature, which appears to be that of [REDACTED]. Further, the fact that the beneficiary and [REDACTED] lived at different addresses approximately 300 miles apart is, if anything, consistent with a marriage entered into for the purpose of evading the immigration laws. Although the beneficiary states, in his affidavit, that [REDACTED] lived in Miami because she was attending school there, there is no evidence of this fact. 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)).

- A statement from [REDACTED] in which [REDACTED] states that, in 2005, she was “engaged in an intimate relationship with [REDACTED] also states “I knew that at the time she was having difficulties in her marriage with [REDACTED] Counsel asserts that this statement shows that [REDACTED] and the beneficiary were attempting to establish a life together. However, no evidence has been provided to show that [REDACTED] knew [REDACTED] and/or the beneficiary or that she had personal knowledge of the circumstances of their marriage. As stated above, 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. at 165.
- Copies of documents relating to the beneficiary’s divorce from [REDACTED] As noted by counsel, the Separation, Support and Marital Settlement Agreement, signed by [REDACTED] on September 9, 2005, states that [REDACTED] and the beneficiary were married on April 4, 2005 and “thereafter they lived together as husband and wife until the final disruption of their marriage.” However, this conflicts with the beneficiary’s affidavit in which he states that [REDACTED] lived in Miami and that he spent most of his time in St. Augustine. 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. at 591-592.

Therefore, an independent review of the documentation reflects ample evidence that the beneficiary attempted to evade the immigration laws by marrying [REDACTED] and that attempt is documented in the alien’s file. Thus, the director’s determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.²

In addition, as noted by the director, the record does not establish that the petitioner had the continuing ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states:

² It is noted that, on appeal, counsel claims that, because the Forms I-130 and I-485 were not denied as fraudulent under section 204(c) of the Act, the petition may still be approved. This argument is without merit. As quoted above, section 204(c) prohibits the approval of petitions if the beneficiary has been accorded, or has sought to be accorded, status as the spouse of a U.S. citizen “by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws.” Accordingly, the statute simply requires a factual determination, not some legal act. In this case, the officer-in-charge indeed determined correctly, as explained herein, that the marriage in question was entered into for the purpose of evading the immigration laws. That is all that is required by the Act. Therefore, the instant petition may not be approved.

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on May 23, 2003. The proffered wage as stated on the Form ETA 750 is \$35,000.00 per year.

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 in 1995 and to currently employ 600 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, the beneficiary claimed to have worked for the petitioner since March, 1997.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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).

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, on appeal, counsel has submitted a 2005 Form W-2, Wage and Tax Statement, issued to the beneficiary by [REDACTED] which is a separate corporate entity from the petitioner. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Counsel also

submits a letter from the petitioner's Chief Financial Officer which states that [REDACTED] is a management company for the petitioner. However, 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. at 165. Therefore, the Form W-2 issued to the beneficiary by [REDACTED] will not be considered in determining the petitioner's ability to pay the proffered wage. There is no other evidence in the record that the petitioner has employed and paid the beneficiary since the priority date was established. Therefore, the petitioner must establish its ability to pay the entire proffered wage.

If, as here, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F.Supp.2d ---, 2010 WL 956001 at *6 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitano* at *6 (E.D. Mich. 2010)(gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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 petitioner’s tax returns demonstrate its net income for the years 2003 through 2006, as shown in the table below.

- In 2003, the Form 1120S stated net income³ of \$5,146,188.00.
- In 2004, the Form 1120S stated net income of \$2,385,098.00.
- In 2005, the Form 1120S stated net income of -\$815,224.00.
- In 2006, the Form 1120S stated net income of \$2,911,920.00.

The petitioner had sufficient net income to pay the proffered wage in 2003, 2004 and 2006. The petitioner did not have sufficient net income to pay the proffered wage in 2005.

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.⁴ 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

³ 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 (for returns from 2003), line 17e (for returns from 2004 and 2005), or line 18 (for returns from 2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 14, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments listed on its Schedules K the petitioner’s net income is found on the Schedules K.

⁴ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

proffered wage using those net current assets. The petitioner's 2005 tax return shows that its end-of-year net current assets for 2005 were -\$7,035,326.00. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2005.

Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage in 2005 through an examination of wages paid to the beneficiary, net income or net current assets.

Counsel asserts on appeal that there is another way to determine the petitioner's ability to pay the proffered wage. Specifically, counsel has submitted a letter from [REDACTED] the petitioner's Chief Financial Officer. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The regulation provides further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may accept* a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

The letter from [REDACTED] states that the petitioner had more than 200 employees in 2005. The letter also states that the petitioner sustained substantial losses from hurricanes in 2005. However, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Further, it is noted that the petitioner's gross receipts were higher in 2005 than in 2003.

The letter also states "The strength of the Company is manifested in its accumulated profits since its inception that were not yet distributed to its owners" and notes that the petitioner had undistributed retained earnings on December 31, 2007 of \$9,750,203.00. However, the petitioner's retained earnings at the end of the year in 2007 are insufficient to establish the petitioner's ability to pay the proffered wage in 2005. Further, "Retained Earnings" is listed on Line 24 of Schedule L and therefore is not considered in determining the petitioner's ability to pay the proffered wage.

Given the record as a whole, we find that USCIS need not exercise its discretion to accept the letter from the petitioner's Chief Financial Officer.

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 Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* 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 this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner did not establish a consistent pattern of profitable or successful years or that it has a sound business reputation. Although the petitioner claimed to have suffered losses in 2005 due to hurricanes, these claims were not substantiated. Instead, as noted above, the record is entirely insufficient to establish eligibility for the benefit sought. The petitioner has not established that it has the 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, the record does not establish that the beneficiary was qualified to perform the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeal on a *de novo* basis).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the Form ETA 750A, item 14, states that the minimum experience for a worker to satisfactorily perform the duties of store manager is two years of experience in the job offered or in a related occupation.

The regulation at 8 C.F.R. § 204.5(l)(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.

The beneficiary indicated on the Form ETA 750 that he was employed as a store manager at [REDACTED] New York, NY from February 1995 to February 1997. In support of this, the petitioner submitted a letter from [REDACTED] which is on [REDACTED] letterhead. The letter states that the beneficiary was employed by [REDACTED] from 1995 to 1998 at Destin, Florida. Thus, there is a conflict between the ETA Form 750 and the letter with respect to the dates and location of employment. In addition, the record contains a Form G-325A, Biographic Information, which was signed by the beneficiary and filed with USCIS in conjunction with a Form I-485, Application to Register Permanent Residence or Adjust Status. On the Form G-325, the beneficiary stated that he resided in Israel until February, 1996. In addition, on the Form G-325 the beneficiary listed his employer as "self" from February, 1996 until "present time."⁵ 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. at 591-592. In this case, the record contains serious inconsistencies regarding the beneficiary's previous employment. No evidence has been submitted to resolve these inconsistencies. Therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position with two years of experience in the job offered or in a related occupation.

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

⁵ The beneficiary signed the Form G-325 on April 4, 2005.