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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**

B6



FILE: [Redacted]
LIN-07-189-50940

Office: NEBRASKA SERVICE CENTER

Date: **FEB 18 2010**

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)

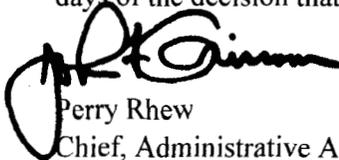
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry concerning your case 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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition filed by the petitioner in this case was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be upheld and the appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign food (Middle-East style cook). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage, and denied the petition accordingly.

The record shows that the appeal is properly and timely filed, 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 January 11, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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).

The Form ETA 750 was accepted on November 10, 2003 and certified on September 26, 2006 initially on behalf of the original beneficiary.¹ The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$21,603.40 per year based on working 35 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered or related occupation as a cook. The I-140 petition on behalf of the instant beneficiary was submitted on June 11, 2007. The instant petition is for a substituted beneficiary.² On the petition the petitioner claimed to have been established on June 5, 1991, but did not provide information on its gross annual income, net annual income and current number of employees. With the petition the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary but not dated, the beneficiary stated that she was currently unemployed and that she worked for [REDACTED], Peru as a cook from July 1, 1996 to July 30, 2002.

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

¹ The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. U.S. Citizenship and Immigration Services (USCIS) records do not contain any I-140 immigrant petition filed and approved on behalf of the original beneficiary based on the instant labor certification.

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. 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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

³ 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).

The court specifically rejected the argument that the Service 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 evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner’s fiscal year is based on calendar year. The record before the director closed on October 1, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2003 through 2006, as shown in the table below.

- In 2003, the Form 1120S stated net income⁴ of \$121,282.

⁴ 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 (2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs->

- In 2004, the Form 1120S stated net income of \$159,537.
- In 2005, the Form 1120S stated net income of \$20,823.
- In 2006, the Form 1120S stated net income of \$52,543.

Therefore, for the years 2003, 2004 and 2006, the petitioner had sufficient net income to pay the instant beneficiary the proffered wage while for the year 2005, it did not.

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.⁵ 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's tax return demonstrates its end-of-year net current assets for 2005 as shown below.

- In 2005, the Form 1120S stated net current assets of \$32,608.

For the year 2005, the petitioner had sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had established that it had the continuing ability to pay the instant beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

pdf/i1120s.pdf (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

⁵According 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.

In the instant case, the petitioner has filed additional Immigrant Petitions for Alien Worker (Form I-140) for 15 more workers for which the petitioner is obligated to demonstrate its ability to pay each of them the proffered wages during the partial or whole period of years 2003 through 2006.⁶ Therefore, the petitioner would need to demonstrate its ability to pay 12 proffered wages in 2003, 15 in 2004, 14 in 2005 and 2006 each including the instant beneficiary.

On appeal counsel asserts that the petitioner has already paid the proffered wages to the beneficiaries of those additional petitions, and therefore, the proffered wages the petitioner already paid to the beneficiaries should not be required again in determining the petitioner's ability to pay the instant beneficiary the proffered wage. Counsel submits copies of the petitioner's IRS Forms 941 and W-2s to support this assertion. The AAO concurs with counsel's assertion. If the petitioner establishes

⁶ USCIS records show that there are more than 120 Form I-140 immigrant petitions filed under the trade name of [REDACTED], however, only 15 of them were filed and approved using the Federal Employer Identification Number: [REDACTED] specifically assigned to the instant petitioning entity, [REDACTED]. The detailed information about these approved immigrant petitions is as follows:

- EAC-01-281-52721 filed on September 24, 2001 with the priority date of March 12, 2001, and approved on April 9, 2002. The beneficiary was adjusted to lawful permanent resident status on April 2, 2004.
- EAC-03-121-50786 filed on February 6, 2003 with the priority date of March 19, 2001, and approved on April 6, 2004. The beneficiary was adjusted to lawful permanent resident status on September 6, 2004.
- SRC-07-084-54255 filed on January 16, 2007 with the priority date of February 3, 2004, and approved on August 23, 2007.
- LIN-07-182-51312 filed on June 13, 2007 with the priority date of December 29, 2003, and approved on November 4, 2008.
- SRC-07-225-50942 filed on June 15, 2007 with the priority date of October 19, 2005, and approved on October 24, 2007.
- SRC-07-223-52281 filed on July 12, 2007 with the priority date of April 5, 2004, and approved on March 12, 2008.
- SRC-08-016-51927 filed on October 18, 2007 with the priority date of April 2, 2004, and approved on July 9, 2008.
- SRC-08-059-51824 filed on December 13, 2007 with the priority date of August 25, 2003, and approved on July 28, 2008.
- SRC-08-059-51846 filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.
- SRC-08-059-51858 filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.
- SRC-08-059-51879 filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.
- SRC-08-059-51898 filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.
- SRC-08-059-51912 filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.
- SRC-08-059-51922 filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.
- SRC-08-060-52052 filed on December 14, 2007 with the priority date of October 17, 2003, and approved on July 30, 2008.

by documentary evidence that it employed all beneficiaries 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. However, evidence submitted by counsel on appeal shows that the petitioner employed and paid only one of the beneficiaries of the approved petitions, [REDACTED] \$8,658.86 in 2003, \$30,144.91 in 2004, \$33,500.00 in 2005 and \$38,600.00 in 2006. The record does not contain any evidence showing that the petitioner employed and paid the proffered wages to the other 14 beneficiaries of the approved petitions, nor does the record contain evidence that the petitioner employed and paid the instant beneficiary the proffered wage. The petitioner has established that it paid [REDACTED] partial wages in 2003 and the full proffered wage in 2004 through 2006.⁷ The petitioner is still obligated to demonstrate that it had sufficient net income or net current assets to pay the difference of \$12,945.40 between wages actually paid to [REDACTED] and the proffered wage, and 11 full proffered wages in 2003, 14 proffered wages in 2004 and 13 full proffered wages in 2005 and 2006.

The petitioner has sufficient funds to pay about half of the sponsored beneficiaries' wages but not all. As previously discussed, the petitioner had available funds of \$121,282 in 2003 which were sufficient to pay the difference of \$12,945.40 and five full proffered wages,⁸ the petitioner's net income of \$159,537 in 2004 was sufficient to pay seven proffered wages; in 2005 the petitioner had net current assets of \$32,608 which were sufficient to pay one full proffered wage; and the 2006 net income of \$52,543 was sufficient to pay two full proffered wages. After taking the net income or net current assets and wages already paid to one of the beneficiaries of the approved petitions into account, the petitioner is still obligated to demonstrate that it had sufficient funds to pay an additional six full proffered wages in 2003, an additional seven full proffered wages in 2004, an additional twelve in 2005 and an additional eleven in 2006.⁹ The petitioner failed to establish its ability to pay all proffered wages in 2003 through 2006 through an examination of wages paid to the beneficiaries, or its net income or net current assets.

Counsel advised that the beneficiary will replace temporary workers and submits the petitioner's Form 1096 and Form 1099s issued by the petitioner to those temporary workers. The evidence submitted shows that the petitioner paid 19 temporary workers in the amount of \$49,191.97 in 2004, 25 temporary workers in the amount of \$75,683.78 in 2005, and 20 temporary workers in the amount of \$51,385.55 in 2006. The record does not, however, indicate the number of these workers, name the workers, state their wages, describe the services they provided to the petitioner, or provide

⁷ Counsel confirms that the proffered wage for the petition LIN-07-182-51312 is identical to the one for the proffered position in the instant case.

⁸ The AAO assumes that proffered wages in those approved petitions are identical to the one in the instant case based on the fact that all of them are offered the same proffered position and the confirmation from counsel quoted in n. 7, *supra*.

⁹ The petitioner would have to show \$129,620.40 in 2003, \$151,223.80 in 2004, \$259,240.80 in 2005, and \$237,637.40 in 2006 assuming the proffered wages in those approved petitions were same as the one in the instant.

evidence that the petitioner has replaced or will replace them with the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. There is no evidence that the positions of these temporary workers involve the same duties as those set forth in the Form ETA 750 for the proffered position of Middle-East style cook. The petitioner has not documented the positions, duties, and termination of the temporary workers who performed the duties of the proffered position. If these temporary workers performed other kinds of work, then the beneficiary could not have replaced them. Even if the petitioner had documented the positions, duties and termination of all of the temporary workers, and the beneficiary could have replaced so many other workers, this consideration would not form the basis of the decision on the instant appeal.¹⁰ The petitioner did not provide evidence that it paid any compensation to its temporary workers in 2003 and therefore, there was no wage already paid to temporary workers that could be utilized towards the beneficiary and pay the six proffered wages the petitioner was also obligated for; the wages paid in the amount of \$49,191.97 in 2004 would not be sufficient to pay seven proffered wages; \$75,6893.78 in 2005 would not be sufficient for twelve proffered wages; and the \$51,385.55 in 2006 would not be sufficient for eleven either.

Counsel contends that assets of “sister corporations” should be considered in determining the petitioner’s ability to pay the proffered wage considering the extremely close ties maintained between the petitioner and these other corporations, and the size and employee volume of all organizations doing business under the same trade name. Although the petitioner shares the same trade name with other incorporated entities, the record shows that the petitioner is registered and formed as a corporation in Virginia and files its own tax return as an independent S corporation. Each of the other eight entities is also structured as an independent corporation. The record does not contain any evidence showing that the petitioning entity and the other corporations are classified as members of a controlled group.¹¹ 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.

¹⁰ Depending on how many employees the petitioner intends to replace with the one beneficiary, the replacement proposition must be realistic and reasonable.

¹¹ Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group’s total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled. Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns (Schedule O to IRS Form 1120).

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.” Consequently, in the instant case, assets of other enterprises or corporations cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage; the petitioner must establish its ability to pay all the proffered wages with its own net income or net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiaries the proffered wages as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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 *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner’s ability to pay the proffered wage.

In the instant case, given the record as a whole, the petitioner’s history of filing petitions and the fact that the number of immigrant petitions reflects an increase of forty percent (40%) of the petitioner’s workforce, the AAO must also take into account the petitioner’s ability to pay the petitioner’s wages in the context of its overall recruitment efforts. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether the petitioner has demonstrated that the beneficiary possessed the required experience for the proffered position prior to the priority date. 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*, 299 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).

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).

In the instant case, the Form ETA 750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of Middle Eastern style cook. The applicant must have two years of experience in the job offered or in the related occupation of cook, the duties of which are delineated at Item 13 of the Form ETA 750A as follows: Season, prepare and cook meat, poultry, seafood, soups, and sauces in the Middle Eastern style cuisine. Item 15 of Form ETA 750A does not reflect any special requirements.

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 any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

As noted above, on the Form ETA 750B signed by the beneficiary but not dated, the beneficiary represented that her prior qualifying employment experience was at a restaurant called [REDACTED] as a cook from July 1, 1996 to July 30, 2002.

The record contains two experience letters both in Spanish from [REDACTED] verifying the beneficiary's experience with [REDACTED] in Peru. One letter is dated August 1, 2002 (August 1, 2002 letter) and the other is dated August 2, 2002 (August 2, 2002 letter). The August 1, 2002 letter appears to be a photocopy of a letter which was cut and pasted to the company's letterhead. The accompanying English translation is on the same cut and pasted letterhead with the translator's original signature. According to the English translation, provided by [REDACTED] the August 1, 2002 letter states in pertinent part that:

The purpose of this letter is to inform that [the beneficiary] with ID [REDACTED] worked for our company [REDACTED] from July 01, 1996 to July 2002. She worked as a cook and after three years she was promoted to cook manager.

The other letter is also written by [REDACTED] but dated August 2, 2002, just one day after the first letter he wrote (August 2, 2002 letter). The August 2, 2002 letter is on original letterhead of the company, with an original signature of the writer. The petitioner submitted an English translation for the August 2, 2002 letter, also by [REDACTED]. That translation does not indicate when the original Spanish version was issued but the translator's certificate was signed by the translator and dated June 5, 2007. According to the English translation, the August 2, 2002 letter states in pertinent part that:

This present document certifies that [the beneficiary] with DNI: [REDACTED] has worked for our firm from July 1st 1996 to July 2002 as Head of the kitchen and Specialist on International foods.

The two letters do not include a specific description of the duties performed by the beneficiary while she worked for [REDACTED] as required by the regulation at 8 C.F.R. § 204.5(g)(1). Without such a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the beneficiary's experience with Sival qualifies her to perform the duties set forth in Item 13 of the Form ETA 750A.

The translations of the August 1, 2002 letter and the August 2, 2002 letter do not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The English translation of the August 1, 2002 letter is on the experience letter which is cut and pasted onto the company's letterhead with [REDACTED] signature. However, the translator did not date his translator's certificate, nor did he explain when and where he translated this document and how it was possible to have [REDACTED] sign the English translation. The English translation of the August 2, 2002 letter appears incomplete because the English translation does not include the name and title of the writer of the letter.¹²

There are also inconsistencies between the two letters issued by the same person just one day apart. In the first letter, [REDACTED] said that the beneficiary worked as a cook for three years and then as a cook manager, however, in the second letter he changed his statement and verified that the beneficiary worked as Head of the kitchen and Specialist on International foods. The record does not contain any documentary evidence explaining why the writer issued two letters within two days, and provided such different statements about the beneficiary's employment. The record does not contain any evidence regarding when the first letter and its English translation were issued. The record does not contain documentary evidence to explain when and where the writer signed his Spanish language letter and the English translation. The signatures of [REDACTED] on the first letter and English translation of the first letter appear different from the one on the original copy of his second letter. 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). The record does not contain such independent objective evidence to resolve these inconsistencies.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). 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)).

¹² The Spanish version of the letter contains [REDACTED] name. The translator translated his surname on the August 1 letter as [REDACTED] but failed to include it on the August 2 one.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 582. Because of these defects, [REDACTED] two letters will be given little weight in these proceedings. Therefore, the petitioner failed to establish the beneficiary's qualifications for the proffered position with regulatory-prescribed evidence.

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

ORDER: The appeal is dismissed.