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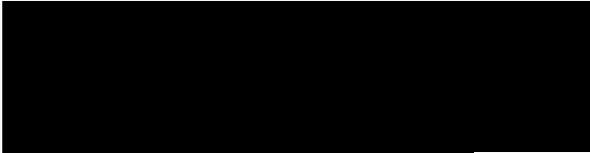
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE: [REDACTED]
SRC 07 034 51444

Office: TEXAS SERVICE CENTER

Date: JAN 13 2010

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:



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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an importer/exporter of food products. It seeks to employ the beneficiary permanently in the United States as a wholesaler. As required by statute, the petition is accompanied by an ETA Form 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 ability to pay the beneficiary the proffered wage in 2003, and since no evidence was submitted by the petitioner in 2005 or 2006, from 2005 onwards.¹ 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 denial, the primary issue in this case is whether or not the petitioner established that it had has the ability to pay the proffered wage in 2003, 2005, or 2006.

Beyond the decision of the director, an additional issue in this case is whether the petitioner, as an affiliate² of a "parent" corporation, may submit the consolidated tax returns of the parent as proof of the petitioner's ability to pay the proffered wage.

Additionally, beyond the decision of the director, an additional issue in this case is whether the petitioner adequately demonstrated that the beneficiary's training and experience conforms to the requirements of the labor certification, specifically, whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the offered position of a wholesaler.

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

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

¹ The director found that the petitioner has demonstrated its ability to pay the proffered wage in 2004.

² IRS regulations state that a parent company must possess at least 80% of a company's voting stock in order for a company to be considered affiliated. See <http://www.irs.gov/pub/irs-reg/td8627.tx?> accessed November 30, 2009.

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. 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 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 ETA Form 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).

Here, the ETA Form 750 was accepted on June 25, 2003. The proffered wage as stated on the ETA Form 750 is \$15.23 per hour (\$31,678.40 per year). The ETA Form 750 states that the position requires two years of experience.

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.³

The petitioner submitted U.S. federal income tax returns Forms 1120S for [REDACTED] (EIN [REDACTED] ("Parent"), for 2002, 2003 and 2004. The Parent's tax returns are consolidated tax returns in which the petitioner is listed on a separate exhibit with its own EIN as an affiliated corporation along with eight other corporations. There are no separate statements pertaining to the net income, current assets or current liabilities of the petitioner included with the consolidated returns. The tax returns of the Parent are insufficient evidence of the petitioner's ability to pay the proffered wage.

According to the U.S. IRS Tax Code, a parent corporation may file a consolidated federal income tax return for itself and all of its subsidiaries. If a consolidated return is filed for any taxable year,

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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 federal tax code requires the filing of consolidated returns (and not separate tax returns) for all such affiliated corporations for each taxable year thereafter. See <http://www.irs.gov/pub/irs-pdf/fl122.pdf> accessed November 30, 2009.

U.S. Citizenship and Immigration Services (USCIS) may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’s ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

As an affiliate, the petitioner’s inclusion in its parent’s consolidated tax return in 2003 does not make that 2003 consolidated tax return which includes both other affiliates and the Parent, sufficient proof of the petitioner’s ability to pay the proffered wage. Further, there is no evidence presented that the Parent (or the petitioner) elected with the IRS to file individual tax returns for 2003 or succeeding tax years. The petitioner’s tax returns for 2003, 2004 and 2005, are insufficient evidence of its ability to pay the proffered wage.

On April 11, 2007, the director issued a Request for Additional Evidence (RFE) instructing the petitioner to submit its annual reports, federal tax returns, audited financial statements, or provide evidence that the petitioner is currently employing the beneficiary, and/or has paid or is currently paying the beneficiary the proffered wage.

On June 4, 2007, in response to the RFE, counsel submitted U.S. federal income tax returns Forms 1120S for the petitioner for 2003, 2004, and 2005.

The director denied the petition on June 15, 2007. According to the director, the evidence submitted stated that the petitioner had net income of <\$26,552.00> and net current assets of <\$348,964.00> in 2003. Therefore, according to the director, the petitioner did not have the ability to pay the proffered wage or net current assets in 2003, although according to the director, the petitioner did have sufficient “net profit” to pay the proffered wage in 2004. The AAO notes, as the Parent purportedly filed a consolidated tax return in 2003, there would have been no need for the petitioner to file its own tax return.

On appeal, counsel asserts that the reputed “tax returns” of the petitioner for 2003, 2004, and 2005, are proof of the petitioner’s ability to pay the proffered wage. Although counsel has complied with the director’s RFE, counsel has not substantiated the authenticity of the petitioner’s “tax returns” for 2003, 2004, and 2005. According to the aforementioned IRS publication, the petitioner as an affiliated company of a Parent corporation would not file annual tax returns. The petitioner’s tax returns submitted are neither signed nor dated. There is no indication that the petitioner’s tax returns were ever filed with the IRS. As submitted, the tax returns are not sufficient evidence of the petitioner’s ability to pay the proffered wage.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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 1982.⁴ According to the tax returns in the record, the petitioner's fiscal year begins on October 1st and ends on September 30th of each year. On the ETA Form 750B, signed by the beneficiary on June 18, 2003, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2003 or subsequently.

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

⁴ According to tax returns submitted, the petitioner was incorporated in 2002. According to the corporate records of the State of Florida at www.sunbiz.org accessed on November 30, 2009, the petitioner is a New Jersey corporation that was registered to do business in the State of Florida on May 31, 2005.

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 record before the director closed on June 4, 2007, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As already stated, it does not appear from the evidence submitted that the petitioner's tax returns were *bona fide* and filed with the IRS. As submitted they are unaudited financial statements and insufficient evidence under the

regulation at 8 C.F.R. § 204.5(g)(2). The AAO will not consider the tax returns as sufficient evidence of the petitioner's ability to pay the proffered wage.

If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, *see also Anetekhai v. I.N.S.*, 876 F.2d at 1220; *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. at 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d at 15.⁵

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

On appeal, counsel asserts that statements submitted by the petitioner's accountant,⁶ both dated July 9, 2007, along with a schedule of six related companies "benefiting from" the petitioner, are evidence of the petitioner's ability to pay the proffered wage. According to the accountant, the petitioner is an "employer [that] operates a wholesale food distribution company which was primarily not designed to operate on a for profit basis." By implication, the accountant is asserting that since all the affiliates are under the same ownership and control of the parent, this is evidence of the ability to pay. The income and assets of the corporate group are not evidence of the ability to pay. 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. 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 submits on appeal approximately 22 bank checking account statements for the period September 2, 2003, to December 31, 2003, as evidence of the petitioner's ability to pay the proffered

⁵ Even if the AAO considered the submitted tax returns, the evidence does not establish that the petitioner could pay the proffered wage in 2003, as noted by the director. The petitioner's 2003 tax return, covering the period October 1, 2003, until September 30, 2004, indicates that the petitioner's net income was <\$26,552.00> and its net current assets were <\$311,309.00>. Accordingly, the petitioner has not established that it had the ability to pay the proffered wage beginning on the priority date. Furthermore, as the priority date is June 25, 2003, the petitioner would need to submit a tax return, an audited financial statement, or an annual report covering the time period between the priority date and the 2003 tax return, which accounts for a time period commencing in October 1, 2003. However, the record is devoid of such evidence. 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)).

⁶ Counsel in his brief refers to the accountant as the petitioner's financial officer or examining officer, but there is no evidence submitted in the record that the accountant is a corporate officer, however there is evidence that the accountant is an independent accountant.

wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Counsel has introduced the bank checking accounts statements to demonstrate the petitioner's "cash flow balance." In a cash flow statement prepared according to generally accepted accounting principles, the sources of cash are disclosed. The general categories are cash received from operations, and, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with an audited balance sheet and income statement, present an analysis of the financial health of a business. No audited financial statements were submitted. The bank checking statements do not demonstrate a cash flow balance.

According to counsel, [REDACTED] is identified as "multi-companies with employer's [sic] 100 or more" and this group's employee roster is evidence of the ability to pay. Counsel's statement is misplaced. There is no evidence in the record the petitioner employs 100 employees or more. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 750 was accepted for processing by the DOL.

According to counsel, the "totality" of the information and financial documentation submitted are evidence of the petitioner's ability to pay the proffered wage. 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 *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, although the parent corporation has been in existence since 1982, the petitioner has been in existence since 2002. According to the petitioner's accountant, the petitioner is a member of a corporate group and not "designed" to earn a profit. As an affiliated corporation among eight other subsidiaries of the parent, there is no requirement under the U.S. IRS tax code for the petitioner to file annual U.S. corporate income tax returns, yet the petitioner has submitted such returns without any explanation or indication that the 2004, 2005 and 2006 tax returns were prepared in the usual course of business and filed with the IRS. The AAO has rejected these returns as unauthentic and not demonstrated by the petitioner to be *bona fide*. Furthermore, as noted supra., these questionable returns do not establish an ability to pay the proffered wage in 2003 even if considered.

Therefore, there is insufficient evidence concerning the petitioner's gross receipts, officer compensation, wages paid to all employees, or business prospects. If the petitioner was not "designed" to earn a profit, then the petitioner has not adequately explained how it will be able to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. Once again, 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)).

Failure to provide required evidence is clear grounds for denial of the petition. The petitioner's failure to submit these documents cannot be excused. 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 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, an additional issue in this case is whether the petitioner adequately demonstrated that the beneficiary's training and experience conforms to the requirements of the labor certification, specifically, whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the offered position of wholesaler.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 750, as certified by the DOL, and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158.

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.

USCIS will look to the labor certification to ascertain the job requirements. According to the ETA Form 750 the job requires two years of experience.

The job duties of wholesaler are stated in Item 13 of the ETA Form 750, part A as follows.

Import and export of South America products. Arrange transportation, shipping and receiving. Discuss prices, sales and freight conditions in Portugese [sic] language.

The ETA Form 750 indicates that DOL assigned the SOC/O*Net(OES) code 41-1012.00 with accompanying job title “First-line supervisors/Managers of non-retail sales workers” to the offered position. DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database at <http://online.onetcenter.org/link/summary/41-1012.00> as accessed December 1, 2009, the job title falls within “Job Zone Four: Considerable Preparation Needed.” DOL assigns a standard vocational preparation (SVP) range of 7.0 to < 8.0 to Job Zone 4 occupations, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” Additionally, DOL states the following concerning the education,⁷ related experience and job training for this occupation:

Most of these occupations require a four-year bachelor's degree, but some do not. A considerable amount of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. A considerable amount of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified.

See id. Because of the requirements of the offered position and the DOL’s standard occupational requirements, the proffered position is for a professional. However, the above regulation (i.e. 8 C.F.R. § 204.5(l)(3)) and decisional law requires that USCIS determine if the beneficiary meets the requirements of the labor certification. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983). As the labor

⁷ According to ETA Form 750, Part B, the beneficiary stated that she has a high school education.

certification requires two years of experience, the AAO will review and analyze the matter as a skilled worker visa preference petition (i.e. 8 U.S.C. § 1153(b)(3)(A)(i)).

In this regard, the regulation at 8 C.F.R. § 204.5(l)(3) requires job experience letters to include the former and current employers of the beneficiary, the name, address and title of the writer and a listing of the beneficiary's dates of employment, job title and a specific description of the duties performed by the beneficiary. The beneficiary listed one prior employer on the ETA Form 750.

The beneficiary stated on the form that her most recent, and only, work experience was from April 1995 to January 2001 with Dental America, a dental products sales business, located in Rio de Janeiro, Brazil, as a wholesaler.

The beneficiary stated the following job duties of this position:

Imported and exported [sic] of dental products. Arranged for transportation, shipping and receiving. Discussed prices, sales, regulations and freight conditions.

According to a letter from the petitioner's accountant dated July 9, 2007, "The [petitioner] operates a wholesale food distribution company which was primarily not designed to operate on a for profit basis," and whose purpose is to function as a "distribution depot" servicing supermarkets specializing in South American and Portuguese products and merchandise. There is no mention in the record that the petitioner imports and sells dental products which is the beneficiary's sole employment experience.

The petitioner submitted a letter from Dental America by [REDACTED], dated January 9, 2003, that stated the beneficiary was employed by the business as a wholesale representative from April 1995 to January 2001. The letter states in pertinent part: "During that time, [the beneficiary] was very dedicated and skillfully [sic] worker, highly motivated and concerned with the quality of our company. She was very punctual and treated her co-workers with friendship and respect. We were truly satisfied with her performance"

The letter does not conform to the regulation at 8 C.F.R. § 204.5(l)(3) and is insufficient evidence of the beneficiary's qualification as a wholesaler as there is no specific description of the duties performed by the beneficiary at Dental America.

Further, there is no correlative evidence to support the beneficiary's employment history such as cancelled pay checks, pay stubs, a history of bank deposits of the beneficiary's pay checks, or the beneficiary's personal tax returns. No other experience letter was submitted to substantiate the beneficiary's reputed work experience as a wholesaler.

Therefore, the preponderance of the evidence does not demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.⁸ 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.

⁸ 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 at 1002 n. 9.