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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
SRC 07 138 52674

Office: TEXAS SERVICE CENTER

Date: **JAN 21 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:

[REDACTED]

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.¹ The appeal will be dismissed.

The petitioner is a law office. It seeks to employ the beneficiary² permanently in the United States as a legal secretary. 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) with an ETA Form 750, Part B for the substituted beneficiary. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition in 2001, 2002, and 2003. 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, an issue in this case is whether or not the petitioner has established that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, additional issues in this case are whether or not the petitioner provided sufficient evidence that the S corporation established in 1993 is the successor-in-interest to the sole proprietorship, and whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 Counsel states in his appeal brief that he is appealing both the denial of the I-140 petition and the denial of the beneficiary's adjustment petition. The AAO has no jurisdiction in adjustment matters.

² The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA Form 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).

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 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 October 23, 2001. The proffered wage as stated on the ETA Form 750 is \$25.40 per hour (\$52,832.00 per year). The ETA Form 750 states that the position requires four years of college and two years of experience in the offered position.

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

On August 22, 2007, the director issued a Notice of Intent to Deny (ITD) informing the petitioner that the ETA Form 750 was altered without the approval of the DOL and instructing the petitioner to submit the original labor certification.

The director instructed the petitioner to submit additional evidence beyond the petitioner's tax returns already submitted of any other resources that the petitioner may have had during 2001 and 2002 to pay the proffered wage such as bank account records, proof of other cash or liquidity, stocks, bonds or any other assets readily convertible to cash.

Additionally, the director instructed the petitioner to submit personal and family household expenses for the individual employer identified in the ETA Form 750 for each year, e.g. 2001 and 2002.

Referencing the regulation at 8 C.F.R. § 204.5(g)(2), the director instructed the petitioner that annual federal tax returns, annual reports and audited financial statements are acceptable evidence to demonstrate the ability to pay the proffered wage.

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 director requested the petitioner's tax return and the beneficiary's Wage and Tax Statement (Form W-2) for 2006.

In response on September 24, 2007, the petitioner submitted an explanatory letter dated September 18, 2007; correspondence with the State of California Employment Development Department, dated September 27, 2002, October 14, 2002, October 31, 2002, and October 22, 2002; spousal joint Forms 1040 tax returns for 2001 and for 2002 (a partial tax return); the petitioner's partial federal tax returns Forms 1120S for 2003, 2004 and 2005; two Form 1099-MISC statements for 2002 and 2003 for another employee; a County of Riverside Deferred Compensation Plan statement for the 1st quarter of 2001 in the amount of \$4,095.57; a Statement of Retirement account for September 28, 2001, in the amount of \$5,633.54; an unaudited financial statement for year end, December 2006; and, a statement of monthly household expenses for years 2001 and 2002 stating monthly expenses of \$3,080.00 and \$4,730.00 respectively.

Other relevant evidence submitted by counsel is a checking account statement as well as a savings statement for the period October 2001 to November 2001; a cancelled check dated October 27, 2001, with page 15 of an agreement; and, the petitioner's federal tax returns for 2004, 2005 and 2006.

As a threshold issue, an additional issue in this case is whether or not the petitioner provided sufficient evidence that the S corporation established in 1992 is the successor-in-interest to the sole proprietorship. From the evidence submitted in the record, the employer identified in the labor certification was a sole proprietorship from the priority date to 2003. Thereafter, according to Articles of Incorporation filed on October 11, 2002, with the Secretary of State of California, a corporation named [REDACTED] was established. According to counsel's brief dated December 17, 2007, the "petitioner" incorporated and then elected to be an S corporation.

There are no assignment or assumption agreements, new financing or refinancing instruments for the corporation, transfers of title from the sole proprietorship to the corporation, business permits or other licensing certificates or other evidence to independently substantiate that the corporation became the successor to the sole proprietorship. 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)).

There is a paucity of evidence in the record other than counsel's assertions that [REDACTED] is the successor-in-interest to the sole proprietorship. This status requires documentary evidence that [REDACTED] has assumed all of the rights, duties, and obligations of the sole proprietorship. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of

proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the petition may not be approved for this reason. 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).

Turning to the primary issue in this matter, 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, 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 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, neither the petitioner nor the sole proprietor has established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe.

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).

Sole Proprietorship

The employer identified in the ETA Form 750 was a sole proprietorship from the priority date to 2003, a business in which one person operates the business in his or her personal capacity. Black's

Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The sole proprietor's statement of monthly household expenses for years 2001 and 2002 disclosed monthly expenses of \$3,080.00 (\$36,960.00 yearly) and \$4,730.00 (\$56,760 yearly) respectively.⁴

In the instant case, the sole proprietor supports a family of five. The proprietor's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040, line 33 and 35)	\$74,036.00	\$74,842.00

In 2001 and 2002, the sole proprietor's adjusted gross incomes of \$74,036.00 and \$74,842.00 fail to cover the proffered wage of \$52,832.00. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. It has also not been established that the petitioner had sufficient liquid assets to pay the proffered wage. *See infra*.

S Corporation

The petitioner was incorporated as an S corporation and began filing tax returns as a corporation from January 1, 2003. The petitioner apparently did not yet exist when the individual identified in the ETA Form 750 sought labor certification. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The ETA Form 750 B was signed by the substituted beneficiary but not dated. The beneficiary did not claim to have worked for the petitioner.

⁴ The director found that the sole proprietor's stated monthly household expenses for years 2001 and 2002 were unrealistically low.

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

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

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

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

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

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on September 24, 2007 with the receipt by the director of the petitioner's submissions in response to the director's ITD. 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 returns⁵ demonstrate its net income as shown in the table below.

- In 2003, the Form 1120S stated net income (Line 21) of \$38,506.00.
- In 2004, the Form 1120S stated net income of \$68,164.00.
- In 2005, the Form 1120S stated net income of \$103,821.00.
- In 2006, the Form 1120S stated net income of \$74,094.00.

Therefore, for the years 2003 the petitioner did not have sufficient net income to pay the proffered wage. In 2004, 2005 and 2006 there was sufficient net income to pay the proffered wage.

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.⁶ 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 returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2003, the Form 1120S stated negative net current assets of \$3,455.00.

⁵ In tax year 2003, Form 1120S, Schedule K, Line 23 was blank. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 12, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2004, 2005, and 2006, the petitioner's net income is found on Schedule K of its tax returns.

⁶ 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.

Therefore, for 2003 the petitioner did not have sufficient net current assets to pay the proffered wage.

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 through an examination of the sole proprietor's adjusted gross income considering his personal expenses in 2001 and 2002, and, also in 2003, through an examination of the petitioner's net income or net current assets.

On appeal, counsel asserts that in 2001, the sole proprietor had sufficient assets to pay the proffered wage because he had a bank checking account with a balance of \$18,064.54 as of November 12, 2001. Counsel's reliance on the balance in the petitioner's bank account 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.

According to counsel, the sole proprietor had a savings account with a balance of \$26,189.56 on November 12, 2001. To substantiate this account, counsel submitted a savings statement in the name of the sole proprietor for the period October 2001, to November 2001. Counsel has not submitted indicia of the balance of that savings account for any other time period. Again, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage, at least through the submission of only one savings account statement. This is insufficient evidence of the petitioner's ability to pay the proffered wage.

According to counsel, the sole proprietor made an investment of \$30,000.00 in Gaelic Capital Group/Team Communications Group "that could be readily available if needed." Counsel's statement that this account represents liquid or liquefiable assets to pay the proffered wage must be qualified. The account is a stock portfolio not a savings account or money market fund. Counsel's evidence for this asset was a cancelled check dated October 27, 2001, and page 15 of an agreement showing the number of shares of stock acquired by the sole proprietor's spouse. Should the sole proprietor sell the stocks, he would pay or be required to pay at tax time either short or long term capital gains. Generally, the impetus for a stock investor is not to sell a stock in less than a year's time to have advantage of the more favorable long term tax treatment. The margin interest charged by the brokerage, as well as brokerage commission, is also an offset to profits from stock sales in the tax year. Generally an investor sells stock to make a profit so there will be times for various reasons that an investor will be reluctant to sell stocks from his/her portfolio that will generate losses rather than profits. Therefore, in this factual situation the stock holding does not appear to be a liquid asset suitable to pay the proffered wage in 2001, 2002 or 2003. 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)).

Counsel asserts that he has submitted two 1099-MISC statements for 2002 and 2003 and contends an independent contractor was paid to perform the duties of the offered position in those years. According to counsel he paid \$53,568.00 in 2002 and \$70,430.00 in 2003. The information does not establish the petitioner's ability to pay the proffered wage. Wages paid to others generally will not demonstrate the petitioner's ability to pay for the instant beneficiary. By implication, the petitioner is asserting that it could replace that independent contractor with the beneficiary. However, the petitioner has not submitted proof of compensation actually paid such as cancelled checks, pay stubs or bank deposits, and there is no evidence other than counsel's assertion that the independent contractor worked in the same capacity as the offered position. There is insufficient evidence that the independent contractor could have been replaced by the beneficiary.

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 2001 and 2002, the sole proprietor's gross incomes stated on the Form 1040, Schedules C, Line 1 were \$103,072.00 and \$185,307.00 for those two years. However, after expenses, the sole proprietor's net profits, Schedule C, Line 31, were \$18,603.00 and \$33,965.00 respectively. Wage income, not derived from the petitioner's business, contributes 80% and 71% to the sole proprietor's adjusted gross incomes for those years. Thus, assessing the totality of the circumstances in this individual case, it is concluded that it has not been established that the sole proprietor had the continuing ability to pay the proffered wage, or that there were any unique circumstances that caused depressed adjusted gross income in 2001 or 2002.

In 2003, the petitioner operated as an S corporation. It was established according to its registration statement in 2002. Its gross receipts less receipts and allowances were \$368,093.00. However, its

total deductions were \$328,506.00. Therefore its net income was less than the proffered wage. Again, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner, operating as a corporation, has not established that it had the continuing ability to pay the proffered wage, or that there were any unique circumstances that caused depressed adjusted gross income in 2003.

Accordingly, the petitioner has not established its continuing ability to pay the proffered wage, and the appeal will be dismissed for this reason.

Beyond the decision of the director, an additional issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

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. 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).

The petition is accompanied by an ETA Form 750 prepared by the petitioner that was approved by the DOL. The ETA 750, Part A of the labor certificate requires two years job experience in the offered position, legal secretary.

Further, the regulation at 8 C.F.R. § 204.5(1)(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.

According to the ETA Form 750, the beneficiary stated that he has a Bachelor's of Science degree in hotel and restaurant management obtained in 1992. The AAO notes that the beneficiary's college transcript supplied contains no secretarial, law or legal courses.

The beneficiary listed three prior employment positions in ETA form 750, Part B. From September 1998 to October 2000, the beneficiary stated in the labor certification that he was a legal assistant with the [REDACTED], the Philippines, and working 40 hours each week. According to the beneficiary his duties there were "Take dictations. Type legal correspondence, various legal forms and other related letters. File, answer phone, make appointments for clients. Monitor hearing schedule to ensure timely preparation of needed documents. Do research for attorney use."

From December 2000 to "present," (the Form is undated), the beneficiary stated that he was self-employed in maintenance/janitorial various hours per week and described his job duties as "Clean and maintain house, offices and stores." From November 2004 to May 2005, the beneficiary stated that he worked as a kitchen helper with a restaurant business named [REDACTED] "on [REDACTED] hours per week, and described his duties as "Assist cooks, clean restaurant."

The record of proceeding contains a letter from [REDACTED] dated February 20, 2007, that states that:

"This is to certify that [the beneficiary] was a regular employee of [REDACTED]
He was assigned as a [REDACTED] from September 28, 1998 to
October 30, 2000.

This certification is being issued upon the request of [the beneficiary] for whatever legal purpose it may serve him best."

The beneficiary's job duties are not stated nor the name and address, or title of the beneficiary's trainer or employer, or a description of the training received, or the experience of the beneficiary as a legal secretary. Therefore, the statement is insufficient evidence under the regulation at 8 C.F.R. § 204.5(1)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

The preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as a legal secretary from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated 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.⁷ 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, the petitioner has not been met that burden.

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.

⁷ 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 at 1043, *aff'd*. 345 F.3d 683; *see also Dor v. INS*, 891 F.2d 997 at 1002 n. 9.