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



U.S. Citizenship
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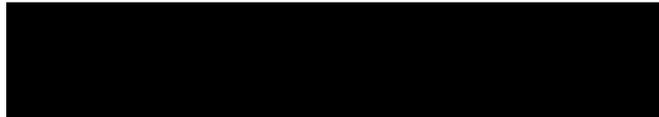
Petitioner:



Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a trucking business. It seeks to employ the beneficiary permanently in the United States as a truck driver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

The director determined in his April 14, 2009 decision that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director additionally found that the petitioner failed to establish that the beneficiary had the required six months of training required on the certified labor certification. The director denied the petition accordingly. Subsequent to the director's decision, the petitioner filed a motion to reopen on May 18, 2009 and submitted documentation to establish that the beneficiary satisfied the six months training requirement set forth on the ETA Form 750. The director then issued a decision on July 30, 2009 stating that the motion to reopen satisfied the requirements of 8 C.F.R. § 103.5 and granted the request to reopen. The director further stated that evidence submitted with the motion establishes "the beneficiary's qualifications,"¹ but did not establish the petitioner's ability to pay the proffered wage from the priority date onward. The director found that all grounds for denial originally stated in his prior decision of April 14, 2009 had not been overcome and affirmed the prior April 14, 2009 decision denying the petition. From that decision the petitioner filed the present appeal.

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.

The issue before the AAO based on the director's decision is the petitioner's ability to pay the proffered wage. Whether the beneficiary meets the position's requirements will also be discussed. Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 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

¹ The AAO disagrees with this determination which will be set forth more fully below.

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 6, 2002. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year). The Form ETA 750 states that the position requires six months of basic training as a truck driver and one year and six months of experience in the proffered position in addition to the following special skills: must have passed six months basic training; must possess a valid driver's license that is in good standing; and must be "good in math."²

It is noted that the Form ETA 750 lists the applicant's [REDACTED] address as [REDACTED] Grayslake, Illinois. The Form I-140 filed by [REDACTED] on July 30, 2007 also lists that petitioner's address³ as [REDACTED], Grayslake, Illinois. The record contains no evidence that [REDACTED] was doing business as [REDACTED] when the Form I-140 was filed, or at any other time. The record does not establish that [REDACTED] is a successor-in-interest to [REDACTED] in order to continue processing under the labor certification filed by [REDACTED].

Matter of Dial Auto is an AAO decision designated as precedent by the Commissioner. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

By way of background, *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The

²The Form I-140 was initially filed for a professional or skilled worker. Upon request of the petitioner, the director changed the position classification filed for to that of an unskilled/other worker requiring less than two years of training or experience.

³ It is noted that the beneficiary's wife's surname is the same as the name of the petitioner. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of Elvira Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).⁴ This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the

⁴The regulation at 20 C.F.R. § 656.30(d) (1987) states:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident. Nothing in the record establishes that [REDACTED] is the same company as [REDACTED] or the successor-in-interest to [REDACTED]. The petitioner must address this in any further filings.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1995 and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed but undated by the beneficiary, 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 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful

⁵ 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).

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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, or any wages, during any relevant timeframe including the period from the priority date in 2002 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). With respect to depreciation, the court in *River Street Donuts* noted:

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

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

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

River Street Donuts at 118. “[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 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence dated March 18, 2009. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2003 through 2007, as shown in the table below.

- On appeal, the petitioner submitted page one of a 2002 Form 1120 for [REDACTED]. The net income stated on page one of that tax return (line 28) is \$64,237. A full copy of the tax return, with all supporting schedules, was not submitted. Thus, it cannot be determined from this submission what the true net income is.⁶
- In 2003, the Form 1120S stated net income of \$1,372.
- In 2004, the Form 1120S stated net income of (\$1,523).

⁶ 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 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (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/or other adjustments shown on its Schedule K for years 2003 through 2007, the petitioner’s net income is found on Schedule K of its tax returns. The director took the petitioner’s net income from page one of the petitioner’s tax returns and concluded that the petitioner had the ability to pay the proffered wage in 2003, 2005 and 2006. As noted herein, however, the petitioner’s net income should properly be taken from Schedule K based on the additional income or deductions.

- In 2005, the Form 1120S stated net income of \$26,774.
- In 2006, the Form 1120S stated net income of \$5,157.
- In 2007, the Form 1120S stated net income of (\$33,864).⁷

Therefore, for the years 2003 through 2007, the petitioner's tax returns do not state sufficient net income to pay the proffered wage.

As previously stated, the petitioner must establish the ability to pay the proffered wage from the 2002 priority date onward. The petitioner did not, however, submit a full copy of its 2002 tax return with the initial filing or on appeal. Instead, the petitioner submitted a copy of the tax return of [REDACTED] (tax identification number [REDACTED]) with the underlying filings. The tax identification number stated by the petitioner ([REDACTED]) on the present Form I-140 and listed on all of its submitted tax returns is [REDACTED]. [REDACTED] appears to be a separate legal entity from the petitioner as it has a separate tax identification number. 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. Counsel states in a response to the director's request for evidence dated March 16, 2009, that the petitioner was registered as [REDACTED] and doing business as [REDACTED] in 2002. The [REDACTED] tax return submitted however, shows that the petitioner's president, [REDACTED] was a 13 per cent owner of that corporation in 2002, not that the company did business as [REDACTED]. Forms 1099 submitted show that [REDACTED] paid [REDACTED] nonemployee compensation of \$431,938 and \$336,868 in 2002. It is unclear why two Form 1099s were issued to [REDACTED]. The record also contains a copy of a 2001 tax return (Form 1065 – General Partnership) for [REDACTED] with an employer identification number of [REDACTED], which was submitted with a Form I-140 filed by that company for the instant beneficiary on July 26, 2002. The separate employer identification number shows that [REDACTED] is a separate company from [REDACTED] and from [REDACTED]. As stated above, nothing establishes a successor relationship between [REDACTED] and [REDACTED] to establish that the beneficiary can continue processing under the original labor certification.

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

⁷ The petitioner did not submit a complete copy of its 2002 tax return. It did submit a copy of page one of that return which shows net income of \$64,237. All other tax returns submitted by the petitioner, however, had entries on Schedule K of the return which determined the petitioner's net income. Without the complete 2002 tax return with all attachments and schedules, it cannot be determined whether the petitioner had sufficient net income to pay the proffered wage in that year.

petitioner's current assets and current liabilities.⁸ 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 for 2003 through 2007, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of \$1,705.⁹
- In 2004, the Form 1120S stated net current assets of \$0.¹⁰
- In 2005, the Form 1120S stated net current assets of \$0.
- In 2006, the Form 1120S stated net current assets of \$250.
- In 2007, the Form 1120S stated net current assets of \$1,209.

Therefore, for the years 2002 through 2007, the petitioner has not established that it 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 not established that it had the continuing ability to pay the 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.

On appeal, the petitioner states that he is attaching its 2002 and 2004 tax returns which were previously submitted and that the returns establish the petitioner's ability to pay the proffered wage.¹¹

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

⁸According 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.

⁹As previously noted, the petitioner did not submit a complete copy of its 2002 tax return. Thus, it cannot be determined whether the petitioner had sufficient net current assets to pay the proffered wage in 2002.

¹⁰While the petitioner included Schedule L in its 2004 and 2005 tax returns, it listed "0" for all entries requested.

¹¹While the petitioner states, on appeal, that it is submitting its 2002 tax return, as previously noted, the petitioner submitted only page one of the tax return, not a complete copy with all attachments and schedules.

new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has failed to establish its ability to pay the proffered wage through an examination of wages paid to the beneficiary (there were none), its net income or net current assets in any relevant year. The petitioner paid minimal salaries from 2002 through 2007, with salaries peaking at \$56,700 in 2006. The petitioner's gross receipts have decreased between 2002 and 2007 by around \$400,000. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that it had the continuing ability to pay the proffered wage from the priority date onward. Nothing shows that the petitioner is the valid successor to the entity on the certified labor certification. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has not established that the beneficiary has one year and six months of experience as a truck driver, or that the beneficiary had six months basic training as a truck driver, a valid driver's license which is in good standing, or that the beneficiary was good in math, all of which are required by the Form ETA 750. As previously stated, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D.

Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (the AAO reviews appeals on a de novo basis).

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.

The petitioner submitted, in support of a previously filed motion to reopen which was denied by the director, a translated statement from the National University of Tucuman, Argentina, which states that the beneficiary obtained six months training in the driving of commercial trucks from December 1992 until June 1993. It is noted that in an experience letter dated March 12, 2009, [REDACTED] states that the beneficiary worked for the National University of Tucuman from June 1993 to January 1996 as a truck driver packing furniture and appliances, loading and unloading trucks, and setting up furniture when necessary. The letter notes that [REDACTED] is in Human Resources but makes no mention of his providing truck driving training to any individual. It is further noted that the work experience attested to by [REDACTED] Human Resources, National University of Tucuman in his March 12, 2009 letter is not listed as experience on the ETA Form 750. Nor does the Form ETA 750 make mention of any training received by the beneficiary from National University of Tucuman. With regard to training, the Form ETA 750 states only "Training Conducted By Company." *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. As the experience was not listed on the labor certification, and the letters do not state that the beneficiary had the required skills, "good in math," the petitioner has not established that the beneficiary has the experience required for the position it offered.

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.