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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

B.G



FILE:



Office: NEBRASKA SERVICE CENTER

Date:

MAR 29 2011

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 now the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a truck equipment manufacturer and seeks to employ the beneficiary permanently in the United States as a welder. The director denied the petition because the petition was submitted without the original certification of the Secretary of Labor.

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.¹

The appeal was filed by [REDACTED] in Los Angeles, California, who submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative signed by the petitioner. However, the State Bar of California indicates that [REDACTED] was disbarred on [REDACTED] 2011 and is still disbarred at the present. [REDACTED] (accessed March 22, 2011)

The Form I-290B was signed by [REDACTED] and thus, the appeal has not been filed by the petitioner, an authorized representative or any entity with legal standing in the proceeding, but rather by an unauthorized person. Therefore, the appeal has not been properly filed and must be rejected. 8 C.F.R. § 103.2(a)(2)(v)(A)(I).

The AAO also notes that the instant appeal must be rejected because this office does not have jurisdiction over appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

Section 203(b)(3)(A)(i) of 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 labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

¹ 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). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

The petition was filed on May 20, 2005 with an uncertified labor certification application for the substituted beneficiary and a correspondence dated January 10, 2005 from DOL regarding the procedures on issuing a duplicate certification (DOL January 10, 2005 correspondence). In the submission letter, the former counsel indicated that the petition is for alien substitution, that the labor certification was originally approved by DOL [REDACTED] and that the submission includes Form ETA 750 "A" & "B" certified by DOL. However, the record does not contain a copy of the certified labor certification and any written request for USCIS to obtain a duplicate certification from DOL. On October 30, 2007, the director denied the petition because the petition was submitted without the original certification of the Secretary of Labor. In the decision, the director also stated that the director sent a request for a duplicate ETA 750 on September 13, 2007, asking for the complete original labor certification, however, DOL

indicated in their response that they had no record of an ETA 750 with this petitioner and the beneficiary ever being filed. The petitioner filed a motion to reopen on November 30, 2007 with copies of the submission, the DOL January 10, 2005 correspondence and an approval notice on I-140 petition [REDACTED]. On January 11, 2008, the director issued a request for evidence (RFE) for an original Form ETA 750 certified by DOL. In response to the director's RFE, the former counsel submitted a letter stating that "Unfortunately, the employer or legal representative did not receive the original certified ETA 750 Form in the mail from the Department of Labor. Therefore, we hereby request that the USCIS make a direct request to the DOL to send a duplicate labor certification to the USCIS showing the case has been certified." On April 1, 2008, the director determined that the petition was submitted without the original certification because DOL had no record of an ETA 750 and the file the petitioner claimed to contain the original labor certification was destroyed in accordance with section 203(g) of the Act.

On appeal, the petitioner asserts that it followed all instructions with respect to obtaining a duplicate certification under 20 C.F.R. §656.30, and therefore, the petitioner met the burden of proof and the petition must be approved.

As the time the petition was filed, the Act did not provide for the substitution of aliens in the permanent labor certification process. Similarly, both USCIS' and DOL's regulations were silent regarding substitution of aliens. The substitution of alien workers was a procedural accommodation that permitted U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, this substitution practice was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140 petition.

All of the substitution procedures were set forth in the Immigration and Naturalization Service (now USCIS) Memorandum, "Substitution of Labor Certification Beneficiaries," Louis Crocetti, Associate Commissioner, HQ 204.25-P (March 7, 1996). This memorandum provides that a request for substitution where a petition for the original beneficiary is already approved should be accompanied by a request to withdraw the original petition. Upon receipt of such a request, the director is instructed to automatically revoke the original petition and transfer the labor certification to the substituted beneficiary's file. The petitioner filed the instant petition on May 20, 2005 without a request to withdraw the petition in behalf of the original beneficiary approved on April 3, 2001, more than four years ago. Without such a request for withdrawal, USCIS cannot automatically revoke the approval of the original petition, cannot transfer the labor certification to the substituted beneficiary's file, further cannot ensure that the labor certification has not been used by the original beneficiary to be adjusted to lawful permanent resident status or admitted as a lawful permanent resident in the United States. In addition, the regulation at 8 C.F.R. §656.30(d) provides that 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. The petitioner has failed to submit any evidence showing that the alleged certified labor certification remains valid to transfer to the

immigrant petition on behalf of the substituted beneficiary. Thus, the petitioner failed to submit sufficient evidence to have its request for substitution approved.

The regulation at 20 C.F.R. § 656.30(e) in effect at that time stated that: "Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only to the Consulate or Immigration Officer who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer." The DOL January 10, 2005 correspondence provided further specific instructions in this matter that "[US]CIS will not automatically make requests for duplicate certifications. They will require some prove that the certification was list as evidenced by their Notice of Action requesting evidence." Despite of these specific instructions, the petitioner did not ask the director to send a written request for a duplicate labor certification to DOL until January 17, 2008, almost three years after the instant petition was filed. By that time, the records of the underlying Form ETA 750 and the original beneficiary's immigrant petition file had been destroyed in accordance with section 203(g) of the Act. Further, the petitioner provided inconsistent reasons for requesting a duplicate labor certification. While it claimed with its initial filing and on motion to reopen that the original labor certification was in the original beneficiary's approved petition file, the former counsel states in his letter dated January 17, 2008, in response to the director's January 11, 2008 RFE, that: "the employer or legal representative did not receive the original certified ETA 750 Form in the mail from the Department of Labor." The inconsistent explanations of the reason for a duplication labor certification did not meet the burden of prove described in the DOL January 10, 2005 correspondence. Furthermore, the record does not contain any independent objective evidence to resolve the inconsistency. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The inconsistency also raises doubts on the reliability of the petitioner's statements that the underlying labor certification in this matter was certified by DOL because the petitioner did not submit a photocopy of the alleged labor certification. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The regulation at 8 C.F.R. § 656.30(c)(2) in effect at that time stated the following: "A labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Application for Permanent Employment Certification form." In adjudicating the instant appeal, while without a copy of the certified labor certification, we do not know the area of intended employment stated on the Form ETA 750, the AAO notes that the petitioner has a new address different from the one on the petition. See <http://kepler.sos.ca.gov/cbs.aspx> maintained by the California Secretary of State (accessed March 22, 2011). It seems that the petitioner intends to employ the substituted beneficiary at the new location outside the terms of the Form ETA 750. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment). The petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will

be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). Therefore, the petitioner failed to demonstrate that it had a valid labor certification for the petition filed on behalf of the instituted beneficiary.

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 does not meet the burden to submit the original labor certification, written request of withdrawing the approval of the original approved petition for the original beneficiary or a request for a duplicate labor certification to USCIS. Since the petition was submitted without the original valid labor certification, the petition cannot be approved and the director's decision that the petition was denied due to lack of the original labor certification must be affirmed.

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As the petition is not accompanied by a valid original labor certification, this office lacks jurisdiction to consider an appeal from the director's decision, and the appeal must be rejected due to lack of jurisdiction.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified additional grounds of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The AAO notes that the petition would be denied on these additionally identified grounds of eligibility even if the instant appeal were not rejected as improperly filed by disbarred attorney and as lack of jurisdiction over the labor certification case as discussed above.

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 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. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the instant case, the Form ETA 750 was initially accepted on October 6, 1997.² The proffered wage the petitioner described on the uncertified Form ETA 750 for the substituted beneficiary is \$11.00 per hour (\$22,880 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a California corporation.³ On the petition, the petitioner claimed to have been established on March 1, 1982, to have a gross annual income of \$965,000, to have a net annual income of \$400,000, and to currently employ seven workers.

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 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 submitted the

² The petitioner claimed that this petition is to substitute the beneficiary for whom the petition was filed. The approval notice of the petition shows that the priority date is October 6, 1997.

³ See California Secretary of State Business Entity database at <http://kepler.sos.ca.gov/cbs.aspx>

beneficiary's W-2 forms for 2002 through 2004 and five paystubs for 2005. The W-2 forms show that the petitioner paid the beneficiary \$6,600 in 2002, \$19,155.88 in 2003 and \$20,129 in 2004.⁴ The five paystubs for 2005 show that the petitioner paid the beneficiary at the level of \$440 per week during the period from July 8, 2005 to August 5, 2005, total of \$2,200. However, we cannot consider these five paystubs as evidence that the petitioner demonstrated that it paid the beneficiary the proffered wage for the year of 2005 since the paystubs do not contain year-to-date earnings. Therefore, the petitioner failed to establish that it employed and paid the beneficiary the full proffered wage from the priority date to the present, but it demonstrated that it paid a partial proffered wage for 2002 through 2005. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the full proffered wage for 1997 through 2001, and the difference of \$16,280 in 2002, \$3,724.12 in 2003, \$2,751 and \$20,680 in 2005 between wages actually paid to the beneficiary and the proffered wage respectively.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

⁴ The W-2 forms bear a social security number different from the one in USCIS records for the beneficiary. It is not clear why a different social security number is used on the beneficiary's W-2 forms. However, for the purpose of calculation, we count these amounts as wages actually paid to the beneficiary by the petitioner.

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).

While the petitioner is structured as a corporation, it files its income tax returns on Schedule C of the shareholder’s Form 1040 Individual Income Tax Returns. The record contains Schedule Cs of [REDACTED] (Federal employer identification number: [REDACTED] for 2001 through 2004. The petitioner’s tax returns demonstrate its net income for 2001 through 2004, as shown in the table below.

- In 2001, Schedule C to the Form 1040 stated net income⁵ of \$19,847.
- In 2002, Schedule C to the Form 1040 stated net income of \$24,599.
- In 2003, Schedule C to the Form 1040 stated net income of \$28,289.
- In 2004, Schedule C to the Form 1040 stated net income of \$31,743.

Therefore, for the year of 2001, the petitioner did not have sufficient net income to pay the beneficiary the full proffered wage, while the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage for 2002 through 2004 respectively. Therefore, the petitioner established its ability to pay the beneficiary the proffered wage for these three years. The petitioner did not submit its tax returns for 1997 through 2000 and 2005, and therefore, the AAO cannot determine whether the petitioner had sufficient net income to pay the beneficiary the full proffered wage in the years 1997 through 2000 and to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2005.

⁵ The AAO takes the figure on Line 31, Net profit or (loss) of Schedule C, Form 1040 as the business entity’s net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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 and include cash-on-hand. 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 files its tax returns on Schedule C of Form 1040 and Schedule C does not contain any information about net current assets. The record does not contain the petitioner's audited financial statements for any relevant years of 1997 to 2005. Therefore, the petitioner failed to submit regulatory-prescribed evidence to demonstrate that it had sufficient net current assets to pay the proffered wage from the priority date to the present.

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.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the

⁶According 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.

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 failed to establish its ability to pay the proffered wage for six out of the nine years in question. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the six years were uncharacteristically unprofitable years for the petitioner. 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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the uncertified labor certification application form, the applicant must have two years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the uncertified Form ETA 750B eliciting information of the beneficiary's work experience, he represented that he has worked for the petitioner as a welder, however, he did not indicate the dates of the employment. He also represented that he worked as a welder for [REDACTED] in Mexico from February 1998 to April 2002. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

With the I-140 petition, the petitioner submitted two experience letters as evidence to establish the beneficiary's requisite experience qualifications. The first letter is dated January 6, 2005 from [REDACTED] General Manager of [REDACTED]. This letter is written in Spanish with English translation. The English translation states that the beneficiary worked for the company as welder from February 9, 1998 to April 13, 2002. This letter does not verify the beneficiary's full-time employment and does not include a specific description of the duties performed by the beneficiary. Moreover, the experience this letter verifies is after the priority date in this matter. Therefore, the letter from [REDACTED] does not meet the requirements set forth by the regulation at 8 C.F.R. § 204.5(l)(3), and thus, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date.

The second letter is dated November 12, 2004 from [REDACTED] Supervisor of Personnel at [REDACTED]. The Spanish letter is accompanied by its English translation. The English translation states that the beneficiary worked for this company as first class welder from October 10, 1992 to February 1, 1994. This letter does not verify the beneficiary's full-time employment and does not include a specific description of the duties performed by the beneficiary, and therefore, does not meet the regulatory requirements. Moreover, the experience this letter verifies is not supported by the beneficiary's statements on the Form ETA 750B. *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. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date.

The record does not contain any other regulatory-prescribed evidence to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date, and therefore, the petitioner failed to establish that the beneficiary is qualified for the proffered position.

The petition would be denied for the above stated reasons, with each considered as an independent and alternative basis for denial if the instant appeal were not rejected. 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 rejected as improperly filed and lack of jurisdiction.