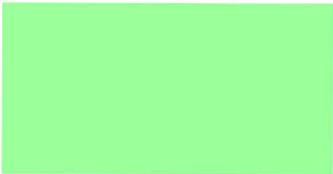


(b)(6)

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



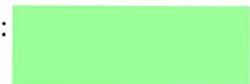
U.S. Citizenship
and Immigration
Services



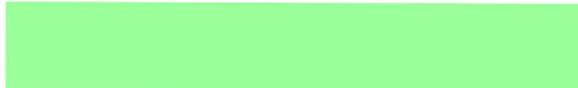
DATE: OFFICE: NEBRASKA SERVICE CENTER

AUG 06 2012

FILE:



IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 an art conservation and restoration business. It seeks to employ the beneficiary permanently in the United States as an art conservator. 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 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 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 April 27, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation 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, 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on July 7, 2003. The proffered wage as stated on the Form ETA 750 is \$48,000 per year). The Form ETA 750 states that the position requires a bachelor's degree in art conservation and two years of experience in the job offered.

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 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 1997 and to currently employ two 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 by the beneficiary on January 14, 2003, the beneficiary claims to have worked for the petitioner as an art conservator 40 hours per week beginning December 1997 until the present.

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'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2003 or subsequently. Forms W-2 were submitted indicating that the petitioner paid the beneficiary wages according to the table below.²

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). 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).

² As the Forms W-2 submitted from 2000, 2001, and 2002, cover a period prior to the priority date of July 7, 2003, they are not necessarily dispositive of the petitioner's ability to pay the proffered wage as of the priority date but may be considered generally.

- In 2000, the Form W-2 stated wages paid to the beneficiary of \$15,892.00.
- In 2001, the Form W-2 stated wages paid to the beneficiary of \$23,194.76.
- In 2002, the Form W-2 stated wages paid to the beneficiary of \$28,050.00.
- In 2003, the Form W-2 stated wages paid to the beneficiary of \$19,115.04.
- In 2004, the Form W-2 stated wages paid to the beneficiary of \$22,697.40.
- In 2005, the Form W-2 stated wages paid to the beneficiary of \$11,648.56.
- In 2006, the Form W-2c stated wages paid to the beneficiary of \$19,648.56.³
- In 2007, the Form W-2 stated wages paid to the beneficiary of \$24,738.29.
- In 2008, the Form W-2 stated wages paid to the beneficiary of \$31,130.24.

Therefore, as the proffered wage was \$48,000.00 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2 but would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2000	\$48,000.00	\$15,892.00	\$32,108.00
2001	\$48,000.00	\$23,194.76	\$24,805.24
2002	\$48,000.00	\$28,050.00	\$19,950.00
2003	\$48,000.00	\$19,115.04	\$28,884.96
2004	\$48,000.00	\$22,697.40	\$25,302.60
2005	\$48,000.00	\$11,648.56	\$36,351.44
2006	\$48,000.00	\$19,648.56	\$28,351.44
2007	\$48,000.00	\$24,738.29	\$23,261.71
2008	\$48,000.00	\$31,130.24	\$16,869.76

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

³ The Form W-2 from 2006 was not submitted, although an Illinois State Form W-2c reflecting wages was submitted and is therefore listed above.

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 on April 15, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 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 2001, 2003, 2004, 2005, 2006, and 2007, as shown in the table below.⁴

⁴ As the tax return submitted from 2001 covers a period prior to the priority date in 2003, it is not necessarily dispositive of the petitioner's ability to pay the proffered wage as of the priority date but may be considered generally. The 2002 tax return was not required and was not submitted.

- In 2001, the Form 1120S stated net income⁵ of -\$588.00.
- In 2003, the Form 1120S stated net income of \$9,918.00.
- In 2004, the Form 1120S stated net income of -\$133.00.
- In 2005, the Form 1120S stated net income of \$1,732.00.
- In 2006, the Form 1120S stated net income of \$6,752.00.
- In 2007, the Form 1120S stated net income of -\$12,160.00.

Therefore, for the years shown of 2001, 2003, 2004, 2005, 2006, and 2007, the petitioner did not have 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 did not include completed Schedules L for any of the years submitted.⁷ Therefore, as the petitioner's net current assets cannot be determined from the evidence in the record, the petitioner has failed to demonstrate that it had sufficient net current assets to pay the proffered wage.

⁵ 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); or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 30, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its tax return for 2006.

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.

⁷ Schedule L to IRS Form 1120S is not required to be completed if the corporation's total receipts for the tax year and its total assets at the end of the tax year are less than \$250,000. *See* <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 30, 2012).

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, counsel cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009) and asserts that if the ability to pay is not clear from the evidence, the employer may prove by other evidence that it has the ability to pay the beneficiary's salary. Counsel also asserts that USCIS should consider the totality of circumstances, including the petitioner's expectations of continued increase in business and profits, that the employee will generate additional income, or that the petitioner has a flood of orders which will generate income enough to hire a new employee.

The AAO notes that the petitioner has failed to submit any evidence into the record which demonstrates a reasonable expectation of continued increase in business and profits, or that the employee will generate additional income, or that the petitioner has a flood of orders which will generate income enough to hire a new employee.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Any assumption of increased business and profits in this matter is purely speculative. The petitioner's gross sales have been in a steady downward trend from year to year and have decreased from \$176,818.00 in 2001 to \$127,025.00 in 2007, and the petitioner's most recent tax return reflects the largest loss in net income it has yet sustained. Thus, it appears that the evidence does not indicate an increase in the petitioner's business or profits.

Further, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

A petitioner must establish the elements for the approval of the petition at the time of filing. 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'r 1971).

The record does not contain evidence of additional contracts or business transactions which are due to the work of the beneficiary. Moreover, it is not clear why the petitioner would expect an increase in new business based on the hiring of the beneficiary since the evidence establishes that the beneficiary has worked for the petitioner well over ten years beginning in 1997.

In *Construction and Design Co. v. USCIS*, the seventh circuit addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage. The employer in *Construction and Design* was a small construction company which was organized as a Subchapter S corporation. The employer sought to employ the beneficiary at a salary of over \$50,000 per year.⁸ The court noted that, according to the employer's tax returns and balance sheet, its net income and net assets were close to zero.⁹ The court also noted that the owner of the corporation received officer compensation of approximately \$40,000.¹⁰

In considering the employer's ability to pay the proffered wage, the court stated that if an employer "has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can 'afford' that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure."¹¹

The court then turned to an examination of the USCIS method for determining an employer's ability to pay the proffered wage. The court noted that USCIS "looks at a firm's income tax returns and balance sheet first."¹² The court, recognizing that the employer bears the burden of proof, went on to state that if the petitioner's tax returns do not establish its ability to pay the proffered wage the petitioner "has to prove by other evidence its ability to pay the alien's salary."¹³ The court found that the employer had failed to establish that it had sufficient resources to pay the proffered wage "plus employment taxes (plus employee benefits, if any)."¹⁴

Thus, the court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method, which is described in detail below, involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Further, the court in *Construction and Design* noted that the "proffered wage" actually understates the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." As noted above, because the instant case arose in the seventh circuit, the AAO is bound by the seventh circuit's decision in *Construction and*

⁸ 563 F.3d at 595.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 596.

¹³ *Id.*

¹⁴ *Id.*

Design. Therefore, pursuant to the decision in *Construction and Design*, the petitioner in the instant case must establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The costs of such benefits are significant. The Office of Management and Budget (OMB) has determined that, in order to calculate the "fully burdened" wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by 1.4.¹⁵ In this case, as noted above, the proffered wage as stated on the labor certification is \$48,000.00 per year. Using the OMB-approved formula, the "fully burdened" wage rate in this case equates to \$67,200.00 per year. Therefore, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner in this case must establish its ability to pay \$67,200.00 per year. Furthermore, the facts and circumstances of *Construction and Design* are further distinguished from those in the instant case in that the petitioner in *Construction and Design* was seeking to convert an independent contractor to a permanent full-time employee, whereas the petitioner in the instant case is not.

In addition, the petitioner did not provide audited financial statements or other evidence of the petitioner's cash flow. Therefore, it is not clear how one can construe that the petitioner would have enough cash flow, either existing or anticipated, to be able to pay the salary of the employee along with its other expenses.

Counsel also refers to two decisions issued by the AAO concerning the ability to pay, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Further, counsel asserts that the petitioner's 100% shareholder's assets should be considered in determining the ability to pay the proffered wage and cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), a case which stood for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with an S corporation. In addition, USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the

¹⁵ The 1.4 multiplier is from the Bureau of Labor Statistics 2009 available at <http://www.bls.gov/news.release/ecec.t01.htm> (accessed June 30, 2012).

proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 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. Therefore, the copies of the personal tax returns of Rick Strilky, the 100% shareholder of the petitioner, which were submitted and the list of assets he owns do not demonstrate the petitioner's ability to pay the proffered wage.

Counsel also misconstrues the use of the Form I-864, Affidavit of Support Under Section 213A of the Act (Affidavit of Support) by asserting that USCIS should consider the affidavit of support signed by Mr. Strilky. The Affidavit of Support is utilized at the time a beneficiary adjusts status to permanent residence in the United States, or obtains an immigrant visa overseas, to provide evidence to USCIS that the applying immigrant has enough financial support to live without concern of becoming reliant on U.S. government welfare. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding. At the I-140 immigrant visa filing stage of proceeding, evidence is required of a sponsoring employer's ability to pay a proffered wage as of the priority date, not its guaranty to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guaranty or Affidavit of Support to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, the Affidavit of Support is a future pledge of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

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

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*, *See id.* The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its

discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's gross receipts have decreased in each year's tax return submitted from 2001 to 2007 except one. No officer compensation was paid in any year. The petitioner indicated on the Form I-140 that it employs two people. Salaries and wages were not substantial and in 2003 and 2007 were exactly the same amount as the salary paid to the beneficiary, indicating that in those years she was the only employee paid wages. While the petitioner has been in business approximately 14 years, it does not pay substantial compensation to its owner. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. 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 also not established that the beneficiary is qualified for the offered position. 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 petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in art conservation and two years of experience in the job offered. On the labor certification, the

beneficiary claims to qualify for the offered position based on experience as an art conservator with the Regional Office for [REDACTED] Poland working 40 hours per week from May 1993 to December 1993 and January 1994 to July 1995.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a certificate from the [REDACTED]

[REDACTED] dated January 7, 1998, and signed by [REDACTED]

[REDACTED] The certificate states that the beneficiary completed numerous conservation projects and other work, with one specific project beginning in May 1993. The certificate also states that she began another project in January 1994 and continued until November 1994, and that between 1994 and 1995, the beneficiary was a member of a conservation team which worked on restoring additional works of art. However, the certificate fails to give a specific date for when the beneficiary's employment ended and it failed to state whether the work was full-time.

The only other employment set forth on the labor certification signed by the beneficiary on January 14, 2003, was work as an art conservator with the petitioner in Chicago, Illinois working 40 hours per week from December 1997 to the present. However, this claim of full-time employment is contradicted by counsel on page 6 of his brief in support of the appeal when he states, "the Beneficiary has previously worked only part time for the Petitioner, so the full wage of \$48,000 was not paid." No explanation was provided in the record to clarify these contradicting claims. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

No other evidence of the beneficiary's experience was provided, and the labor certification at Part B, question 15 where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," does not list any other employment besides the two noted above.

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment

practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.¹⁶

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)¹⁷ in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,¹⁸ the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish “the ‘dissimilarity’ of the position offered for certification from the position in which the alien gained the required experience.” *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. In the instant case, the beneficiary claimed to have the required experience with prior employer. Therefore, the DOL was precluded from conducting a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience.¹⁹

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as the beneficiary’s experience gained with the petitioner was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary’s experience with

¹⁶ In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. *See E & C Precision*.

¹⁷ 20 C.F.R. § 656.21(b)(5) [2004].

¹⁸ *See Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

¹⁹ The fact that the beneficiary’s experience with the petitioner was not mentioned on Form ETA 750, Part B also precludes the consideration of this experience to establish that the beneficiary had the qualifications stated on the labor certification application, as certified by the DOL. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), 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.

the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.