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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



B6

DATE: **SEP 24 2012**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
 Beneficiary:

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

ON BEHALF OF PETITIONER:

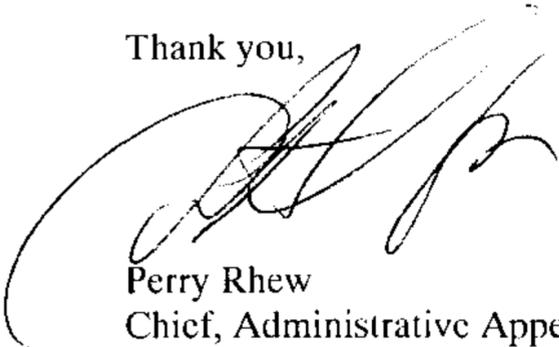


INSTRUCTIONS:

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,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a construction company. It seeks to permanently employ the beneficiary in the United States as a plaster and stucco mason.¹ The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).²

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is December 28, 2009. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed 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 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.³

¹ The ETA Form 9089 states the job title of the offered position as "plaster and stucco mason," however, the Form I-140 states the job title of the offered position to be only a "stucco mason." This appears to be a scrivener's error, however, the job duties listed on the labor certification are detailed and vary markedly from the five (5) word job description provided on the I-140. The petitioner must clarify this issue in any further filings, addressing the issue of whether the job certified on the ETA Form 9089 is the same as the proposed employment on the Form I-140. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

² Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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 Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.8. Alternate combination of education and experience: None accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a full-time plaster and stucco mason with [REDACTED] located in [REDACTED] from January 15, 2006, until December 1, 2008. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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 record contains an experience letter from the [REDACTED] company letterhead stating that the company employed the beneficiary as a “full time plaster and stucco mason” from January 15, 2006 until December 1, 2008. The letter describes the beneficiary’s experience during her employment with Anchor.

As the director noted in her Request for Evidence (RFE), dated December 22, 2010, and again in the denial of this case, dated April 20, 2011, the beneficiary’s claimed full-time work experience with Anchor, as documented by this letter, conflicts with other evidence in the record.⁴ In response to the director’s RFE, the petitioner provided an affidavit, sworn under penalty of perjury, from the beneficiary. The affidavit from the beneficiary again contradicted the experience claimed by the beneficiary on the labor certification, and the letter from Anchor. In her affidavit, the beneficiary stated that she was employed part-time by Anchor from January 15, 2006, until an undefined time in 2007, rather than the full-time employment indicated by Anchor and by the beneficiary on the labor certification. In the affidavit, the beneficiary declared that her employment with Anchor was in fact part-time, “approximately 25 hours per week,” during 2006 and 2007. The beneficiary then states that she began full-time employment with Anchor sometime in 2007, but fails to indicate when this full-time employment began. Therefore, the beneficiary contradicted herself in two sworn statements, and both statements contradict the letter from Anchor, which casts doubt on the veracity of the evidence in the record. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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.

⁴ In support of an prior labor certification filed by Poor Hank’s, Inc. (Hank’s), the beneficiary’s W-2 statements for 2006 and 2007 were provided, indicating that the beneficiary was working at Hank’s at the same time she claimed she was working full-time with Anchor. Further, the employment with Hank’s was not listed on the instant labor certification, despite occurring within the three years preceding the filing of the labor certification. Part K of the labor certification states “[l]ist all jobs the alien has held during the past three years” (emphasis added). Further, the beneficiary’s claimed employment with Anchor was not listed on a Form G-325A, dated July 26, 2007, filed with the beneficiary’s I-485 Application to Register Permanent Residence or Adjust Status, which requires the applicant’s employment for the last five years. It is noted that the G-325A states, in bold, “Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact.” The Form G-325A does not contain limitations on the type of employment to be included; counsel’s argument that the beneficiary’s employment at that time was “irrelevant” and “unimportant” and, therefore, did not need to be included, is unpersuasive.

As the director notified the petitioner in the denial of the instant petition, the beneficiary's contradictory attestations give rise to inconsistencies in the record, which must be overcome with independent, objective evidence. *Matter of Ho*, 19 I&N at 591-592. The letter from [REDACTED] cannot be accepted as credible evidence of the beneficiary's claimed experience without additional independent, objective evidence of her employment experience.

On appeal, counsel has provided a statement in which he states "please accept this as the petitioner[s] Statement in support of the enclosed [appeal]." However, the statement is signed by counsel, and is not ratified by the petitioner. Counsel's assertions cannot be attributed to the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Even if the AAO were to consider counsel's statement generally, it would not be independent nor objective evidence of the beneficiary's employment experience with [REDACTED], which is at issue.

On appeal, the petitioner provided payroll records from the beneficiary's prior employer, [REDACTED]. Counsel asserts that the payroll records establish that the beneficiary was, in fact, a full-time employee at [REDACTED] in 2006 and 2007 as the beneficiary asserts. It is unclear to what end counsel provides this documentation; while it may, or may not, establish the beneficiary's full-time employment as a cook for [REDACTED] that employment was not in the position offered in the instant labor certification. Thus, whether that employment was full-time is tangential to the instant case, as it only serves to cast doubt on the veracity of the beneficiary's employment history. It is not likely that the beneficiary was employed full-time at two jobs in two different cities at the same time. Most importantly, however, this documentation is not independent, objective evidence of the beneficiary's claimed experience in the position offered, which is the issue in the instant case. Therefore, even if the petitioner demonstrated that the beneficiary was employed full-time by Hank's, which, based on the rate of pay is unclear, it does not demonstrate the amount of time that beneficiary was employed by [REDACTED] in the position offered.⁵

⁵ The beneficiary states in her affidavit that "[w]hen I left Poor [REDACTED] in 2007 I began full time employment as a plaster and stucco mason at [REDACTED]" Counsel argues that the beneficiary's "steady gross income" at [REDACTED] confirms that she was employed full-time at [REDACTED] and part-time at [REDACTED]. If the AAO were to accept counsel's argument, the record would reflect that in 2007 the beneficiary received \$10,290 in gross pay from [REDACTED] at a rate of \$210 per week, therefore, the beneficiary was employed full-time at [REDACTED] for 49 weeks in 2007. This would indicate that the beneficiary was not employed full-time at [REDACTED] until sometime in December 2007. As there is no independent, objective evidence of the beneficiary's employment with [REDACTED] in 2006, the evidence would establish only that the beneficiary had part-time employment with [REDACTED] for the majority of 2007, and therefore she could not have accrued the 24 months of full-time experience required on the labor certification by the end of her employment with [REDACTED] December 1, 2008. As discussed above, the AAO does not accept the evidence relating to the beneficiary's claimed experience with [REDACTED] as credible, as it has not been sufficiently corroborated by independent, objective evidence to demonstrate the number of hours worked.

As noted by the director in her denial, the petitioner provided Forms 1099 documenting nonemployee compensation paid by ██████ to the beneficiary for 2007 and 2008. A Form 1099 was not provided for 2006, and there is no other evidence of compensation paid by ██████ to the beneficiary during 2006 in the record. The Forms 1099 document only end-of-year compensation, and do not document the hours worked, rate paid, or services provided. Therefore, they are not independent, objective evidence of the amount of work experience gained by the beneficiary with that employer. The Forms 1099 cannot corroborate the beneficiary's claims that she worked 25-hours per week in 2006 and 2007, or that she became a full-time employee in 2007, or that she was a full-time employee in 2008. The petitioner did not provide payroll records or any other evidence documenting the hours worked by the beneficiary during 2006, 2007, or 2008 for ██████. Therefore, the petitioner has not established what amount of experience, if any, relevant to the position offered that the beneficiary gained through employment with ██████ during 2006, 2007, or 2008.

Therefore, the petitioner has not resolved the inconsistencies that resulted in the instant petition's denial. As there is insufficient independent, objective evidence in the record of the beneficiary's qualifications, the petitioner has not established that the beneficiary had the experience required on the labor certification as of the priority date.

On appeal, counsel states that "where the Service has found that there was no 'objective evidence' it failed to consider the objective evidence in conjunction with the alien/beneficiary's explanation." As discussed above, the evidence of the beneficiary's experience in the record includes: the labor certification prepared by two interested parties, the petitioner and beneficiary; an affidavit from an interested party, the beneficiary; a letter from ██████ and Forms 1099 issued by ██████ in 2007 and 2008 to the beneficiary. The information provided by the beneficiary contradicts that of the only third party evidence in the record, the letter from ██████. The Forms 1099 alone cannot establish the amount of part-time experience the beneficiary gained, as they merely represent a total amount of nonemployee compensation paid by ██████ to the beneficiary in the given year; they are not indicative of hours worked or duties performed, nor are they exclusive of other factors such as overtime pay, shift differentials, or bonuses. No evidence confirming the beneficiary's employment with ██████ in 2006 was provided. Therefore, as the petitioner has not provided sufficient independent, objective evidence to verify the beneficiary's total amount of experience with ██████ the petitioner has not established that the beneficiary had the experience required on the labor certification as of the priority date.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 priority date is December 28, 2009, with a proffered wage of \$31.79 per hour (\$66,123.20 per year).

According to USCIS records, the petitioner has filed at least one other I-140 petition on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). Based on information provided by the petitioner, the priority date of the other beneficiary's I-140 is February 5, 2010. The petitioner states that this second I-140 petition remains pending. Thus, in 2009, the petitioner only had the responsibility to document its ability to pay the proffered wage to the instant beneficiary, as the second beneficiary's labor certification had not yet been filed with DOL. The petitioner must demonstrate its ability to pay the proffered wage for both beneficiaries from 2010 onward.

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 2006 and to currently employ five (5) workers. The petitioner has provided its income tax return for 2009, as well as W-2 Wage and Tax Statements issued by the petitioner to the beneficiary for years 2009 and 2010. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on December 28, 2009,⁶ the beneficiary did not claim to have worked for the petitioner.

⁶ The AAO notes that the labor certification was prepared and filed on December 28, 2009, and certified on May 19, 2010. The beneficiary dated her signature on the labor certification "12/28/09," however, as the original labor certification cannot be signed until after being approved, the beneficiary could not have signed the labor certification until after May 19, 2010.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 provided a W-2 Wage and Tax Statement stating that it paid the beneficiary \$47,674 in 2009, which is \$18,449.20 less than the proffered wage. However, the beneficiary indicated on the labor certification that she was not employed by the petitioner as of the labor certification's filing date, December 28, 2009. This inconsistency between the beneficiary's claimed employment and the W-2 statement must be overcome by independent, objective evidence in any further filings before the W-2 statement can be accepted as evidence of wages paid. *Matter of Ho*, 19 I&N at 591-592. The petitioner provided a W-2 statement for 2010 stating that it paid the beneficiary \$39,262, which is \$26,861.20 less than the proffered wage. If the petitioner can demonstrate that it paid these amounts to the beneficiary, then it must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2009 and 2010. Additionally, the petitioner must also demonstrate that it can pay the proffered wage to the additional sponsored worker during 2010, as discussed above.

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 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 petitioner's tax return, Form 1120S, demonstrated its net income⁷ of \$84,694 for 2009. This amount is sufficient to pay the difference between the wages paid to the beneficiary in 2009, and the proffered wage. The record lacks the regulatory prescribed evidence for 2010,⁸ as the petitioner did not provide its tax return, audited financial statements, or annual report for 2010. Therefore, for the

⁷ Where an S corporation's income is exclusively from a trade or business, as is the case here, 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.

⁸ The director requested in his Request for Evidence (RFE) that the petitioner submit evidence of the petitioner's ability to pay the proffered wage for 2010 to include the petitioner's tax return, audited financial statement, or annual report. The petitioner did not submit any evidence for 2010 beyond the beneficiary's Form W-2 for that year. In any further filings, the petitioner should submit its 2010 federal income tax return, audited financial statement, or annual report.

years 2010 onward, the petitioner has not demonstrated that it had sufficient net income to pay the proffered wage to this beneficiary and the other sponsored worker from 2010 onward.

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.⁹ 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. As discussed above, the record lacks the petitioner's 2010 tax return, therefore, the petitioner has not demonstrated that it had sufficient net current assets to pay the proffered wage to this beneficiary and the other sponsored worker from 2010 onward.

Therefore, from the date the ETA Form 9089 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.

If the petitioner's net income or net current assets are not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner provided only a single year's tax return. The AAO cannot determine the overall magnitude of the petitioner's business activities in the absence of the petitioner's 2010 tax return. Further, the beneficiary indicated that she was not employed by the petitioner as of the labor certification's filing date, December 28, 2009, however, the petitioner provided a W-2 statement in the beneficiary's name documenting significant wages paid by the petitioner to the beneficiary in 2009. This inconsistency between the beneficiary's claimed employment and the W-2 statement must be overcome by independent, objective evidence in any further filings. *Matter of Ho*, 19 I&N at 591-592. The petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets. Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

⁹ 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.

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 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.