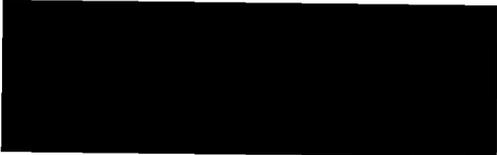


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

DATE: Office: TEXAS SERVICE CENTER

APR 25 2012



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 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a barber and styling business. It seeks to employ the beneficiary permanently in the United States as a stylist. 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 October 23, 2008 denial, the primary 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$38,368.00 per year, including the overtime listed on the certified Form ETA 750. The Form ETA 750 states that the position requires a two year cosmetology diploma and one year 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 business was allegedly operated by [REDACTED] [REDACTED] the first quarter of 2002, and was structured as a general partnership. Thereafter, the petitioner was structured as an S corporation (2002 through 2007). On the petitioner's income tax returns, the petitioner claimed to have been established in 2000 and incorporated in 2002. On the Form ETA 750B, signed by the beneficiary on October 14, 2005, the beneficiary claims to have been employed by the petitioner since 1999.

As a threshold matter, it has not been established that the petition is accompanied by an individual labor certification from the DOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). Although the original employer identified in the Form ETA 750 is [REDACTED] the petitioner (a corporation) had not yet been formed. Instead, it appears that the entity which actually filed the Form ETA 750 was a general partnership called [REDACTED] which is no longer doing business. The only way for petitioning corporation to be able to use a Form ETA 750 approved for a different employer is if [REDACTED] establishes that it is a successor-in-interest to that employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

In this matter, the record is devoid of evidence establishing that [REDACTED] is a successor-in-interest to the employer who filed the labor certification application. The record does not contain any evidence detailing the transaction, such as an agreement of sale, bill of sale, or any other record documenting the transaction in detail. Accordingly, the AAO will dismiss the appeal for this additional reason. The petition is not accompanied by an individual labor certification from the DOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). Nevertheless, even assuming for the sake of argument that the petitioner is the successor-in-interest to the partnership which filed the labor certification, the petitioner has failed to establish its continuing ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The petitioner did not provide any evidence of wages paid to the beneficiary.

If, as in this case, 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 submitted a copy of an IRS Form 1065 for the 2001 tax year, bearing the partnership name [REDACTED]. The petitioner claims that this was its business name prior to incorporating the business as an S corporation in 2002. Even if the AAO were to take into consideration the net income and net current asset amounts that appear on [REDACTED] [REDACTED] is Form 1065, it would not be equal to or greater than the proffered wage amount.

The proffered wage is \$30,368.00. The Form 1065 tax return stated its net income as detailed in the table below.²

- In 2001, the Form 1065 from [REDACTED] stated net income of \$48,746.00.
- In 2002, the Form 1065 from [REDACTED] (first quarter) stated net income of \$23,124.00.

Although the net income amount exceeds the proffered wage amount for 2001, USCIS electronic records indicate that the petitioner has filed additional immigrant petitions since the priority date, including two others in 2001. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would need to establish that it has the ability to pay combined salaries of the beneficiaries.

Therefore, for 2001 and the first quarter of 2002, the petitioner's alleged predecessor did not establish that it had sufficient net income to pay the proffered wage.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partner's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the

² For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedules K have relevant entries for additional deductions in the relevant tax years and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

³ 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.

proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's alleged predecessor's tax returns stated its net current assets as detailed in the table below.

- In 2001, the Form 1065 from [REDACTED] stated net current assets of \$0.00.
- In 2002, the Form 1065 from [REDACTED] stated net current assets of \$0.00.

The petitioner submitted a copy of its Forms 1120S income tax returns for 2002, 2003, 2004, 2005, 2006, and 2007. The proffered wage is \$30,368.00.

The petitioner's 1120S⁴ tax returns demonstrate its net income as shown in the table below:

- In 2002, the Form 1120S stated net income of -\$3,934.00.
- In 2003, the Form 1120S stated net income of -\$7,648.00.
- In 2004, the Form 1120S stated net income of -\$7,808.00.
- In 2005, the Form 1120S stated net income of -\$6,609.00.
- In 2006, the Form 1120S stated net income of \$11,906.00.
- In 2007, the Form 1120S stated net income of \$39,945.00.⁵

Therefore, for the years 2002, 2003, 2004, 2005, and 2006, the petitioner failed to establish its ability to pay the proffered wage to the beneficiary through its net income.

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

⁴ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003); line 17e (2004-2005); and line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 20, 2012) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Where the petitioner has additional entries on its Schedules K, the petitioner's net income is found on Schedule K of its tax returns.

⁵ As noted above, although the net income amount for 2007 exceeds the proffered wage amount, USCIS records show that the petitioner has multiple petitions pending and has not demonstrated its ability to pay all proffered wage amounts.

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

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 return demonstrates its net current assets as shown in the table below:

- In 2002, the Form 1120S stated net current assets of \$14,600.00.
- In 2003, the Form 1120S stated net current assets of \$11,602.00.
- In 2004, the Form 1120S stated net current assets of \$17,022.00.
- In 2005, the Form 1120S stated net current assets of -\$101,977.00.
- In 2006, the Form 1120S stated net current assets of \$9,996.00.
- In 2007, the Form 1120S stated net current assets of \$16,852.00.

Therefore, for the years 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner failed to establish its ability to pay the proffered wage to the beneficiary through its net current assets.

Accordingly, from the date the labor certification was accepted for processing by the DOL, neither the petitioner nor its alleged predecessor has 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 net income or net current assets.

On appeal, counsel asserts that the director failed to consider all of the facts and evidence in the case in order to obtain an accurate account of the petitioner's financial ability to pay the proffered wage. Specifically, counsel argues that USCIS failed to consider officer compensation in evaluating the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner paid officer compensation to its shareholders each year. Counsel further asserts that this officer compensation is discretionary and could have been used to pay the proffered wage. The record of proceeding contains a signed and dated notarized statement from one of the petitioner's owner/shareholder [REDACTED] who stated that she and her husband are the sole shareholders of the corporation, and that they were willing to forego their salaries (officer compensation) in order to pay the beneficiary's salary for all relevant years. The documentation presented here indicates that the petitioner's two shareholders each own 50 percent of the company's stock. The record also shows that according to the petitioner's IRS Form 1120S, first page at line 7 (Compensation of Officers), the petitioner elected to pay in officer compensation \$52,800.00 in 2002, \$79,200.00 in 2003, \$81,600.00 in 2004, \$89,600.00 in 2005, \$104,000.00 in 2006, and \$99,000.00 in 2007, respectively. However, there is no evidence in the record of proceeding, e.g., sworn affidavits from each shareholder to show that each shareholder agreed to forego their compensation from the priority date until the beneficiary obtains lawful permanent residence status, in the annual amount of \$30,368.00 per year, which is the proffered wage in this matter. Without such proof, the AAO may not consider the officers'

cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

compensation to determine the petitioner's ability to pay the proffered wage. Even if the AAO were to take into consideration the officer compensation amounts for each year in determining whether the petitioner had established its ability to pay the proffered wage, the petitioner did not submit a copy of the shareholder's personal income tax returns for 2004 through 2007, and a list of the shareholder's recurring monthly household expenses for 2003 through 2007. Thus, the petitioner has not demonstrated that the shareholders would have been willing and able to forego officer compensation during 2002, 2003, 2004, 2005, 2006, and 2007, while still covering their own household expenses and dependents. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is again noted that the petitioner had simultaneously pending Forms I-140; therefore, the petitioner must establish that it could have paid all of these wages.

Counsel asserts that the petitioner is not obligated to show that it has paid the prevailing wage to the beneficiary, and is not required, prior to approval of the I-140 petition, to employ the beneficiary. Although the petitioner may not be obligated to demonstrate that it has paid the prevailing wage or that it has actually hired the beneficiary, it may establish that through the beneficiary's wages, and/or the petitioner's net income or its net current assets, the petitioner has the ability to pay the proffered wage since the priority date. It has not done so in this matter.

On appeal, counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Contrary to the petitioner's claim, no detail or documentation has been provided to explain how the beneficiary's employment as a hair stylist has or will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns which demonstrate an overall decline in net profits from 2002 to 2005. Furthermore, the beneficiary stated on the ETA Form 750B that she had been employed by the petitioner since 1999; however, there is no indication from the evidence that her employment has improved the petitioner's business since 1999.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 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.

Counsel's assertions cannot be concluded to outweigh the evidence of record 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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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 *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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in 2001, 2002, 2003, 2004, 2005, 2006, and 2007, that would have directly affected its ability to pay the proffered wage. Counsel asserts that the petitioner anticipates a steady increase in its income and that it has always paid its financial obligations. Counsel further asserts that the petitioner anticipates growth of its business in the coming years. Contrary to counsel's claims, reliance on the petitioner's future receipts and wage expense is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. Similarly, the petitioner showing that it paid wages in excess of the proffered wage is insufficient. Furthermore, the petitioner has not shown through professional prepared financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage, or that the beneficiary's proposed employment is an indication that the petitioner's income will increase. Regardless, future projections of increased income are insufficient to demonstrate the petitioner's ability to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, and 2007. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose

primary duties were described in the Form ETA 750. Overall, the record is not persuasive in establishing that the job offer was realistic.

Accordingly, 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. 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. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 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. 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 two years of "college" (1500 hours of instruction in cosmetology school) and one year experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a hair stylist.

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 letter from [REDACTED] whose representative stated that the company employed the beneficiary as a hair stylist from February 1996 through August 1996. The record also contains a letter from [REDACTED] whose representative stated that he employed the beneficiary as a hair stylist from January 1995 through December 1995. The declarants failed to specify their title or affiliation with the businesses, and they failed to specify the job duties performed by the beneficiary or the number of hours she worked each week. 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.