

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

(b)(6)

DATE: **DEC 10 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a computer software consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. 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 16, 2009 denial, an 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 March 29, 2005. The proffered wage as stated on the Form ETA 750 is \$77,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in "CS, MIS, CIS, any Eng., math" in addition to one year of experience in the job offered: programmer/analyst.

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

On appeal, counsel submits a brief; a copy of the director's request for evidence (RFE), a letter dated June 2, 2009 from [REDACTED] Certified Public Accountant; a profit and loss statement for 2008; copies of the petitioner's U.S. Income Tax Returns for an S Corporation (Form 1120S) for 2003, 2004, 2005, 2006, 2007 and 2008; copies of pay statements which the petitioner issued to the beneficiary in 2009; a letter dated June 15, 2009 from [REDACTED] Director of Staff Development for [REDACTED] copies of the petitioner's business checking account statements from 2008 and 2009; and a copy of a Civil Case Detail.

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 currently to employ 30 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 July 12, 2007, the beneficiary claimed to have worked for the petitioner since October 2005.

On appeal, counsel asserts that the director erred in denying the instant petition on grounds which were not addressed in the RFE; in finding that the petitioner had not demonstrated the ability to pay for 2005; in including the year 2008 in his analysis and as a basis for the denial; and in failing to consider the totality of the petitioner's financial circumstances.

We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a

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).

May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

USCIS records indicate that the petitioner has filed 190 petitions since the petitioner's establishment in 1997, nearly all of which were filed after 2001, including 162 I-129 petitions, and 27 I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715.

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 submitted copies of IRS Forms W-2 which it issued to the beneficiary in 2005, 2006 and 2008 as well as pay statements which it issued to the beneficiary for part of 2007 and 2009. However, IRS Forms W-2 and all of the pay statements contain a social security number which was issued to an individual who is not the beneficiary.² The AAO will not consider compensation paid using a stolen social security number in

² Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

a determination of the petitioner's ability to pay. Therefore, the petitioner has provided no bona fide evidence of having employed or paid the beneficiary any wages from the priority date in 2005 onwards.

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

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).*

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

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 February 26, 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 was the most recent return available at that time. However, on appeal, the petitioner submitted its federal income tax return for 2008. The petitioner's tax returns demonstrate its net income for 2005, 2006, 2007 and 2008, as shown in the table below.

- In 2005, the Form 1120S stated a net loss³ of \$47,228.00.
- In 2006, the Form 1120S stated a net loss of \$43,459.00.
- In 2007, the Form 1120S stated a net loss of \$31,457.00.
- In 2008, the Form 1120S stated a net loss of \$7,771.00.

Therefore, for the years 2005, 2006, 2007 and 2008, 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005, 2006, 2007 and 2008, as shown in the table below.

- In 2005, the Form 1120S stated net current liabilities of \$472,068.00.
- In 2006, the Form 1120S stated net current assets of \$75,214.00.
- In 2007, the Form 1120S stated net current assets of \$140,762.00.
- In 2008, the Form 1120S stated net current assets of \$103,065.00.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage. In 2007 and 2008, the petitioner demonstrated sufficient net current assets to pay one beneficiary the proffered wage. However, as indicated above, since 2001 the petitioner has filed 162 I-129 petitions and 27 I-140 petitions. Assuming that the wage proffered to the

³ 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 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 September 13, 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 no additional income, credits, deductions or other adjustments shown on its Schedule K for any of the years from 2005 through 2008, the petitioner's net income is found on Line 21 of the first page of Form 1120S.

⁴ 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.

beneficiaries of the other petitions is comparable to the wage proffered to the beneficiary of the instant petition, the petitioner has not demonstrated the ability to pay more than one beneficiary the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in denying the petition on grounds which were not addressed in his request for evidence. Specifically, counsel notes that the director requested evidence relating to the petitioner's ability to pay solely for the years 2006 and 2007 but then denied the petition for failure to demonstrate the ability to pay for 2005 and 2008. Counsel makes reference to an unpublished administrative decision issued by this office as well as to 8 C.F.R. § 103.2(b)(8) for the premise that "a denial is not appropriate when initial documentation is provided to establish eligibility and the Service does not raise any questions or request additional evidence regarding that area of eligibility."

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, the regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the evidence indicated that the petitioner did not have the ability to pay the beneficiary the proffered wage for 2005. Yet, the record lacked required initial evidence of the petitioner's ability to pay for 2006 and 2007. The director, in his discretion, could have denied the case without requesting any evidence. However, in an apparent effort to complete the record, the director requested evidence for 2006 and 2007. Accordingly, the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence for 2005, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. The evidence submitted on appeal has been considered as articulated above and does not overcome the basis for the denial.

On appeal, counsel also asserts that, based upon the evidence supplied, the director erred in finding that the petitioner did not demonstrate the ability to pay the beneficiary the proffered wage for 2005. Counsel asserts that the petitioner demonstrated the ability to pay by means of net income, net current

assets, or wages already paid to the beneficiary for each year with the exception of 2005. Counsel asserts that the petitioner demonstrated a history of financial health but that the shortfall of 2005 was anomalous due to the petitioner's bank issuing an unexpected demand that it repay certain short-term and long-term loans which the bank had made to it. According to counsel the petitioner had loans in the amount of \$768,106 with Bank One but that Bank One was sold to JP Morgan Chase in 2004. Counsel asserts that as the petitioner was late with one of its financial reports which the bank required, JP Morgan Chase called in all of the loans made to the petitioner and that the requirement of paying back such loans resulted in a net loss for 2005.

First, as articulated above, the petitioner has not demonstrated the ability to pay the proffered wage for any year, with the exception of 2005. Because the petitioner compensated the beneficiary through the use of a stolen social security number, the AAO will not consider such funds in a determination of the ability to pay. Second, the petitioner is obligated to demonstrate the ability to pay the beneficiaries of all the petitions which it has filed and has not demonstrated such ability either through net income or net current assets for any of the years from 2005 through 2008.

Further, as counsel notes in his brief, \$649,568 was owed in "mortgages, notes and bonds payable in less than 1 year." In other words the vast majority of the money which the petitioner was required to pay constituted current liabilities. USCIS would have considered such sums in analyzing the petitioner's net current assets. Thus if the amount of the petitioner's "mortgages, notes and bonds payable in less than 1 year" had been reduced significantly due to the petitioner's repayment of such liabilities, its net current assets would have increased and thereby reflected positively upon the petitioner's financial situation even if its net income was reduced. Further, the petitioner has not demonstrated how the repayment of certain short-term loans would have reduced its net income. Loans might affect the petitioner's net current assets. However, there is no specific line item on the first page of Form 1120S in which loan repayment would be deducted from income. Line 19 on the first page of Form 1120S identified "other deductions." However, the claiming of such deductions requires the completion of an attached Statement (Statement 1) but this statement was not supplied.

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)).

On appeal, counsel further asserts that the director erred in including an analysis of 2008 in his determination. However, the director included a discussion of 2008 because the petitioner supplied the IRS Form W-2 which it issued to the beneficiary in response to the director's request for evidence. The director addressed this document in his analysis and doing so also required a discussion of whether or not the petitioner had sufficient net income or net current assets to pay the difference between wages paid and the full proffered wage because the wages reflected on the W-2 were less than the proffered wage.⁵ Further, on appeal, the petitioner has had the opportunity to provide its federal income tax returns for 2008 and these were considered in our analysis as set forth above.

⁵ As discussed above, these wages were not considered in the analysis of the petitioner's ability to pay because the IRS Form W-2 which the petitioner issued to the beneficiary contained a stolen

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On appeal, counsel also submitted the petitioner's bank statements for 2008 and 2009. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L which was considered above in determining the petitioner's net current assets.

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*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the 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 claims that the evidence demonstrates a history of financial health and that the year 2005 was anomalous due to an unforeseen banking situation. However, the petitioner provided financial documentation for the years 2003 through 2008, the years 2003 and

social security number.

2004 predating the priority date in the instant circumstance. Rather than revealing 2005 as anomalous in a history of financial growth, the tax returns show that the petitioner's gross sales have been consistently declining since 2003. By 2008, the petitioner's gross sales figure was only 33 percent of the total sales for 2003. Similarly payroll has declined by nearly the same rate. Thus, the petitioner has not demonstrated a history of profitability. Further, though the director did not mention it in his determination, USCIS records show that the petitioner has filed 190 petitions since 2001, a fact which demands a significantly greater financial outlay than the proffered wage in the instant circumstance. 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,⁶ 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'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 one year of experience in the job offered as a programmer/analyst. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a programmer/analyst with [REDACTED] from July 2001 to July 2002.

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 dated June 7, 2007, from [REDACTED] Vice President, on [REDACTED] letterhead. The letter states that the beneficiary was employed with [REDACTED] as a programmer/analyst developer from July 3, 2001 to July 31, 2002. The record also contains a letter dated September 30, 2004, from N [REDACTED]

⁶ 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).

Surabhi, Director, on [REDACTED] letterhead. This letter states that the beneficiary was employed with [REDACTED] from August 1, 2002 to September 30, 2004 as a programmer analyst. The dates of employment listed in this letter cannot be reconciled with the dates listed in the second letter, nor with the dates listed on the labor certification. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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.