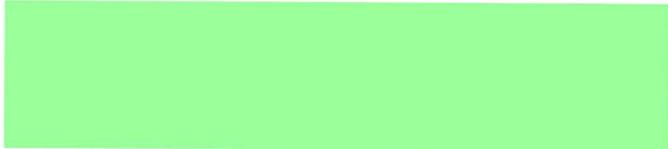
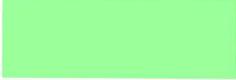


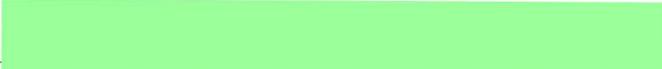


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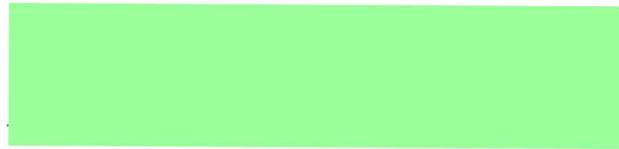


DATE: DEC 17 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a landscape design and construction company. It seeks to employ the beneficiary permanently in the United States as a general plantation, concrete, brick and stone superintendent. 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 September 27, 2009 denial, the 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00¹ per hour (\$31,200 per year based on 40 hours per week).² The Form ETA 750 states that the position requires three years of experience in the job offered as a general plantation, concrete, brick and stone superintendent.

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

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship in 2001 and as an S corporation from 2002 to 2008. On the petition, the petitioner claimed to have been established in 1991 and to currently employ one worker. 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 April 21, 2001, the beneficiary did not claim to have worked for the petitioner.

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).

¹ The Form ETA 750 was signed by the petitioner and beneficiary on April 20, 2001 and April 21, 2001, respectively. The record includes copies of a series of amendment requests from the petitioner, signed by the beneficiary and petitioner in September 2007. The AAO notes that one of the requested changes, signed September 25, 2007, is to the rate of pay, changing it to \$24.62 per hour (\$51,209.60 per year based on 40 hours per week). The labor certification contains a stamp/annotation on Page 1, Question 6 ("Address") that says "Correction approved by regional office AD 9/10/07." The typed address is crossed out and a new address was handwritten in. No annotations or changes were made to the rate of pay. The Form ETA 750 was certified on November 15, 2007. While both the director and counsel refer to the \$24.62 wage rate in the denial, the amendment was not certified by the DOL. Therefore, the instant petition will be reviewed based on the \$15.00 per hour rate of pay certified by DOL.

² The labor certification states that the overtime rate will be "\$1 ½" per hour, as needed.

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 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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 record before the director closed on May 8, 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 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available.

In 2001, the petitioner was structured as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports himself and one dependent. The proprietor's tax return reflects the following information for 2001:

- In 2001, the Form 1040, line 33 stated adjusted gross income of \$21,699.

In 2001, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$31,200. The petitioner's sole proprietor submitted a statement indicating that his yearly expenses for 2001 were \$32,772. It is improbable that the sole proprietor could support himself and a dependent on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Therefore, the petitioner has not demonstrated its ability to pay the proffered wage for 2001.

From 2002 through 2008, the petitioner was structured as an S corporation. The petitioner's tax returns demonstrate its net income for 2002 through 2008, as shown in the table below.

- In 2002, the Form 1120S stated net income⁴ of -\$14,784.
- In 2003, the Form 1120 stated net income of -\$128,180.
- In 2004, the Form 1120 stated net income of -\$107,134.
- In 2005, the Form 1120S stated net income of -\$58,096.
- In 2006, the Form 1120S stated net income of -\$11,074.
- In 2007, the Form 1120S stated net income of -\$2,975.
- In 2008, the Form 1120S stated net income of -\$92,220.

Therefore, for the years 2002 through 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.⁵ 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 2002 through 2008, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of -\$36,230.
- In 2003, the Form 1120S stated net current assets of -\$72,626.

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), or line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 19, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2003, 2004, and 2005, the petitioner's net income is found on Schedule K of its 2003, 2004, and 2005 tax returns.

⁵ 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.

- In 2004, the Form 1120S stated net current assets of -\$88,729.
- In 2005, the Form 1120S stated net current assets of -\$107,909.
- In 2006, the Form 1120S stated net current assets of -\$137,375.
- In 2007, the Form 1120S stated net current assets of -\$126,388.
- In 2008, the Form 1120S stated net current assets of -\$120,830.

Therefore, for the years 2002 through 2008, the petitioner did not have sufficient net current assets to pay 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 states the petitioner does have the ability to pay the beneficiary the proffered wage and asserts that, when reviewing the income tax returns, USCIS should consider the petitioner's tax returns under the "totality of the circumstances" approach and consider depreciation, amortization, and the availability of "non-recurring and outside expenses" to pay the proffered salary. As mentioned above, with respect to depreciation, "[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). *See also 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).

Counsel references the petitioner's line of credit, stating:

The line of credit/credit line should be considered as part of the net income or net assets available to pay the proffered wage. The Service considers the actual existent loan amount on the credit line/line of credit for purposes of considering the liabilities in terms of assets, but refuses to consider the remainder available to pay the proffered wage... The average compensation of officers during the relevant years was approximately \$50,469. The average salaries/wages during the relevant years was approximately \$17,254... the compensation of the officers and/or salaries and wages may have been extracted from the line of credit/credit line to allow use of the net income to pay [the beneficiary] the proffered wage.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See John Downes and Jordan Elliot Goodman, Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a “commitment to loan” and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Kaighak*, 14 I&N Dec. 45, 49 (Comm’r 1971). Moreover, the petitioner’s existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner’s net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner’s liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 1977).

Counsel asserts that USCIS failed to give proper weight to the petitioner’s bank statements. Counsel’s reliance on the balances in the petitioner’s bank accounts 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 that was considered in determining the petitioner’s net current assets.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. Counsel states, “... for the year 2001, Petitioner must show he had the ability to pay eight months of [the beneficiary’s] salary...” We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary’s wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Counsel further states, “... the equity in [the petitioner’s] home was approximately \$400,000 (real estate taxes totaled \$8,768 and mortgage totaled \$40,109).” Counsel claims the petitioner’s equity was available to pay the proffered wage. The petitioner failed to submit evidence of assets with which to pay the proffered wage. The assertions of counsel do not constitute

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evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserts that USCIS improperly calculated the yearly salary based on 40 hours per week instead of 35 hours per week. Counsel states:

Petitioner need only show the ability to pay the proffered wage for full-time employment from the priority date until present. 8 C.F.R. § 204.5(g). Full-time employment is defined in the INA and CFRs as a minimum of 35 hours per week... The Service ignored Petitioner's assertion in the Response to the RFE that 35-hours per week was to be calculated when ascertaining the proffered wage for "full-time" employment... Further, the Service fails to take into account federal and state holidays as well as lawful unpaid leave and vacation when determining the proffered wage... There are 13 State and/or Federal Holidays per years [*sic*] in California. In addition, under the law, an employee may take 1 personal holiday or sick day per year... the Service failed to account for the allowed 13 Holidays and 10 Personal/Sick Days allowed by the State of California. Proper recalculation under the applicable laws and regulations evidences Petitioner's ability to pay the proffered salary."

The labor certification, signed by the petitioner on April 20, 2001 and by the beneficiary on April 21, 2001, states on Page 1, Question 10.a. ("Total Hours Per Week: Basic") "40." The AAO has reviewed the petitioner's letter dated May 4, 2009 and counsel's letter dated May 4, 2009, submitted in response to the director's March 27, 2009 RFE. Neither letter includes a statement from the petitioner indicating that the beneficiary would be employed for 35 hours per week. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Counsel advised that, in 2002, wages paid to subcontractors could have been adjusted to pay the beneficiary's wages. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the subcontractors involves the same duties as those set forth in the ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel also asserts that the petitioner may demonstrate the ability to pay the proffered wage based on "... the potential for future profitability or the availability of substantial investment capital from an investor. Petitioner's lengthy employment viability and success coupled with [the beneficiary's] experience and knowledge in plantation, concrete, brick and stone will increase Petitioner's revenue."

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 on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate 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 petition shows that the petitioner has been in business since 1991 and employs one employee. The sole proprietor's adjusted gross income reported on Form 1040 is less than the proffered wage in 2001. The petitioner's net income and net current assets reported on Form 1120S for 2002 through 2008 failed to establish the ability to pay the proffered wage. The petitioner's net income and net current assets were negative from 2002 through 2008. The petitioner's gross receipts and officer compensation decreased from 2002 through 2008. The salaries and wages paid did not change significantly from 2002 through 2008. In a letter dated May 4, 2009, the petitioner claimed that the company purchased land in 2001 that incurred a short term loss for that year. The petitioner also stated that, during 2002, 2003, 2004, and 2005, the company incurred

additional short term losses improving the property. In 2006, the petitioner invested in a duplex and incurred additional losses in 2007 and 2008. The petitioner claims that both are now paid off and are valuable assets. However, no evidence was provided to corroborate the petitioner's claims and no documentation was submitted to demonstrate how these events impacted the petitioner financially. The petitioner also failed to establish a previous history of having the ability to pay the proffered wage. No evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. 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 three years of experience in the job offered as a general plantation, concrete, brick and stone superintendent. On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience:

- As a General Gardening/Landscape/Labor with various employers in the LA area from 1984 to 1993.
- As a Landscape with [REDACTED] in California from 1993 to December 1994.
- As a Landscape with [REDACTED] in California from 1990 to April 1994.
- As a Self-Employed Subcontractor working in landscape, concrete, brick, and stone installation beginning in 1994 and continuing at least until the date the labor certification was signed on April 21, 2001.

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).

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 April 15, 2009, written by [REDACTED] Owner, from [REDACTED] in California. The letter states that the beneficiary worked for the company on a full-time basis as a Superintendent for the landscape and construction crew from February 1993 to December 1994, for a total of one year and ten months. The record also includes an affidavit from the beneficiary dated May 4, 2009. The beneficiary states that he was unable to obtain an experience letter from [REDACTED] because the company is no longer in business. The beneficiary states that he was employed by [REDACTED] on a full-time basis from 1990 to April 1994, providing landscaping services. The beneficiary also states that he was self-employed from 1994 to 2001 as a landscape and construction worker, providing landscaping and construction services on a full-time basis for different companies on a cash basis in the Los Angeles, California area. No other documentation was submitted to corroborate the beneficiary's statement. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)). Further, the beneficiary's affidavit fails to provide specific dates of employment, which would allow the AAO to calculate the amount of experience the beneficiary has accrued.

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.