

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

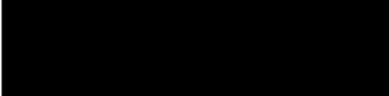


BE

DATE: DEC 07 2012

OFFICE: TEXAS 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:

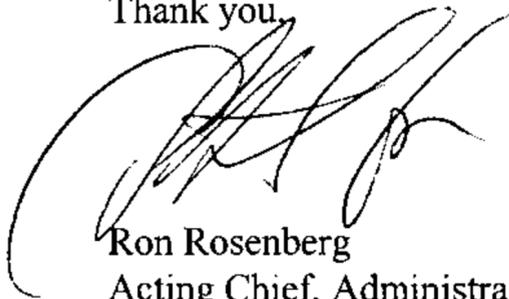
SELF-REPRESENTED

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

The petitioner is a self-described dry cleaner & alterations business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor 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 and 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 February 21, 2008, 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.

Ability to Pay

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 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on March 8, 2006. The proffered wage as stated on the ETA Form 9089 is \$11.86 per hour, or \$24,668.80 per year.¹ The ETA Form 9089 states that the position requires a high school diploma and 24 months of experience in the position 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.²

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in June 2004 and to employ five (5) workers. On the ETA Form 9089, signed by the beneficiary on August 23, 2006, 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 Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

¹ The petitioner indicated that \$475.00 was the offered wages per week on Form I-140, which equates to \$24,700. For this decision, the proffered wage of \$11.86 per hour (24,668.80 annually) will be used, as this is the amount on the certified labor certification. Further, the petitioner indicated on the labor certification and on Form I-140 that its tax identification number begins with "2," however, Schedule C of the sole proprietor's tax returns indicates an entity that has a Federal Employer Identification Number (FEIN) beginning with "8." It is unclear from the record whether Schedule C represents the petitioning business. In any future filings, the petitioner must resolve this discrepancy with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92.

² 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).

that it employed and paid the beneficiary the full proffered wage, or any wages, from the priority date, March 8, 2006, 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).

The petitioner is 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 a family of three (3). The proprietor's tax returns³ reflect that the sole proprietor's adjusted gross income⁴ (AGI) for 2006 was \$54,015. The petitioner has provided the sole proprietor's estimated monthly expenses for 2006 and 2007.⁵ The sole

³ The record before the director closed on October 9, 2007, with the receipt by the director of the petitioner's submissions in response to the director's Request for Evidence (RFE). As of that date, the petitioner's 2007 federal income tax return was not yet due. The AAO notes that this appeal was accepted on March 24, 2008; the sole proprietor's 2007 tax return was not yet due at that time.

⁴ Internal Revenue Service Form 1040, line 37.

⁵ Prior to this appeal, the record contained an estimate of the sole proprietor's expenses, which was received on October 9, 2007, in response to the director's RFE of August 11, 2007. On appeal, the

proprietor's 2006 self-estimate of expenses include \$1,342 in mortgage costs, \$202 for utilities, \$114 for phone, \$35 for internet, \$198 for insurance, \$41 for cable, \$320 for food, and \$465 for credit cards, for a total of \$2,717 in self-estimated monthly expenses in 2006. The sole proprietor's annualized expenses would equate to \$32,604. The sole proprietor self-estimated his monthly expenses for 2007 to be \$5,806.33, or \$69,676 annually. The petitioner indicated that this marked difference in expenses is explained by the sole proprietor's purchase of "a new business and a new house." The sole proprietor claimed \$1,342 in mortgage costs in 2006, and \$3,400 in 2007; however, the sole proprietor's 2006 tax return reported payment of \$23,606 in mortgage interest and taxes alone, which equates to a monthly amount of over \$1,967 without the inclusion of any principal payments. This amount is in excess of the sole proprietor's estimated \$1,342 monthly mortgage expense by more than \$600, which would represent an almost 50% increase in the mortgage expenses claimed by the petitioner, even without the inclusion of the amounts paid towards the mortgage principal. Additionally, the contention that the sole proprietor's 2006 expenses should not include mortgage expenses for the "new house" does not appear to be accurate. According to public records, the sole proprietor appears to have owned at least three (3) real estate holdings during 2006; a home purchased in September 2004, for which the petitioner provided an estimated mortgage expense as discussed above, as well as a condominium purchased in May 2006,⁶ and another home purchased in October 2006.⁷ Therefore, it appears that the sole proprietor's mortgage expenses are inaccurate as they do not include these additional housing expenses. The record also contains a reviewed financial statement that indicates the sole proprietor's mortgage obligations in 2007 were \$6,142 for the three properties; therefore, the amount the sole proprietor estimated for 2007, \$3,400, is also inaccurate, as it is contradicted by the reviewed financial statements provided by the petitioner's Certified Public Accountant (CPA). Further, the sole proprietor indicated on his estimate of expenses that he had no child care expenses, however, this expense category is claimed as a deduction on the tax return provided.⁸ The conflicts between the tax return, which must be signed by the filer under the penalty of perjury, the reviewed financial statements, and the sole proprietor's unsworn estimates, cast doubt on the sole proprietor's estimate of monthly expenses. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a

petitioner contends that this estimate pertained only to year 2007, and was inaccurate for year 2006. The petitioner provided separate monthly expense estimates identified as pertaining to 2006 and 2007 with this appeal.

⁶ See Fairfax County, Virginia, Department of Tax Administration, *Real Estate Assessment Information Site*, <http://icare.fairfaxcounty.gov/search/commonsearch.aspx?mode=parid> (search by map number 0293 17020619) (accessed December 6, 2012). The AAO notes that this report appears to relate to the sole proprietor and indicate that the sole proprietor purchased this property on May 18, 2006, and that the mortgage was foreclosed and resold by Deutsche Bank with a recordation date of November 2, 2009.

⁷ See Henrico County, Virginia, Finance Department, Real Estate Assessment Division, *Property Search*, <http://www.co.henrico.va.us/iRae/f?p=101:17:1127684356341489::NO::> (accessed December 6, 2012).

⁸ IRS Form 1040, Page 2, Line 48.

reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Based upon the discrepancies with the sole proprietor's estimated expenses, the reviewed financial statements, and his tax return, it is not clear that the sole proprietor's self-estimates are accurate; the petitioner's monthly expenses would appear to be higher than the expenses set forth in the petitioner's statement of expenses. The petitioner must resolve these issues with independent, objective evidence in any further filings before the estimate can be accepted. *Id.* at 591-92. As the record does not contain any independent, objective evidence of the sole proprietor's expenses, the AAO does not accept the petitioner's estimate of monthly expenses as accurate. Even if the AAO were to accept the sole proprietor's estimate of expenses for 2006 (\$32,604), the sole proprietor's AGI (\$54,015) less those expenses leaves too little (\$21,411) to pay the beneficiary's proffered wage (\$24,688.80). Therefore, the record does not establish that the petitioner had sufficient AGI available to pay the beneficiary's proffered wage from the priority date onward.

According to USCIS records, the petitioner has filed at least one (1) additional I-140 petition on behalf of another beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage, or wages paid to the other beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. In any future filings, the petitioner must demonstrate its ability to pay the proffered wage of all beneficiaries until the beneficiary is granted lawful permanent residence, or the petition is withdrawn, revoked, or denied.

On appeal, prior counsel⁹ requested that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. 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 specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements, the petitioner has not submitted such evidence.

Counsel asserted that the sole proprietor's net current assets demonstrate the petitioner's ability to pay the beneficiary's proffered wage. To support this conclusion, the petitioner has provided a

⁹ At the time that the appeal was filed, the petitioner was represented by counsel, however, that attorney is not currently authorized to practice law. *See* Executive Office for Immigration Review, Attorney Discipline Program, *List of Currently Disciplined Practitioners*, http://www.justice.gov/eoir/profcond/FinalOrders/LeeSaiH_FinalOrder.pdf (accessed December 6, 2012) (expelled May 12, 2010). This practitioner is referred to herein as counsel for purposes of clarity only.

“Reviewed Financial Statement,” dated March 17, 2008, which accompanies two financial statements for the years ending December 31, 2006, and December 31, 2007. The AAO notes that, while this evidence is described as originating with a Certified Public Accountant, the writer of the letter does not identify himself as a CPA, nor was the letter written on company stationery. The letter is on plain paper and does not indicate any contact information for the writer. The letter is titled “Accountant’s Note.” The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant’s report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that the petitioner submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants’ Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account’s report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. As noted above, the sole proprietor’s representations regarding at least his property holdings appear to be inaccurate. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel asserted that the petitioner claimed a deduction for depreciation in 2006, which should be considered to be income for that year as “the owner could have used this fund to pay for the beneficiary’s wage during the year 2006.” With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), 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 v.*

Thornburgh, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added). Therefore, reliance on the sole proprietor's claimed depreciation deduction as an asset available to pay the beneficiary's proffered wage is misplaced.

Counsel also asserted that the sole proprietor's bank statements evidence the petitioner's ability to pay the beneficiary's proffered wage. The funds in the Bank of America accounts¹⁰ are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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, based on the evidence in the record, the funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the

¹⁰ The petitioner provided one set of statements under the trade name [REDACTED] and another set of statements under the trade name [REDACTED]. Both accounts are in the sole proprietor's name only. The first set covers the period from January 1, 2006, to December 31, 2007, with the exception of July 2007. The second set covers the period from May 1, 2006, to September 2007, with the exception of June and July 2007.

calculation of the petitioner's AGI, which is insufficient to establish the petitioner's ability to pay the proffered wage.

The record of proceeding contains a single monthly statement from the sole proprietor's personal checking accounts covering the period from November 29, 2007, through December 27, 2007. As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the *priority date year or in any subsequent year* based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. Here, the petitioner has not provided sufficient statements to document the account balances from the priority date onward. Thus, the evidence of the sole proprietor's cash assets as reflected in his checking accounts is insufficient to establish the petitioner's continuing ability to pay the proffered wage.

The petitioner indicated that it had "significantly [*sic*] changes made by the sole proprietor in his financial status during the time period between the year 2006 and 2007," including the purchase of an additional business. However, the petitioner did not provide any information documenting this purchase, or provide any information describing what financial change this might have caused. 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)).

The petitioner claimed on Form I-140 to have commenced operating his dry cleaning business on June 14, 2004, approximately 17 months prior to placing the advertisements described on the labor certification, and less than two (2) years before filing the labor certification. As of 2006 the petitioner was claiming to employ five (5) employees, however, the sole proprietor's tax return reflects wages and salaries of only \$8,060 for that year. It does not appear credible that the petitioner employs five other workers on the wages and salaries paid in 2006, or those workers would only be part-time, which raises the question of whether the petitioner needs, or intends, to employ the beneficiary on a full-time basis.¹¹

The petitioner claims that the sole proprietor's assets have increased from \$733,234 in 2006 to \$2,052,557 in 2007, which represents an increase of "2.3 folds within a year." However, the record indicates that the majority of the sole proprietor's assets are real estate holdings, which are burdened with mortgage and tax obligations. As noted above, it appears that at least one bank has foreclosed on at least one of the petitioner's real estate holdings.

¹¹ The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

Unlike the petitioner in *Sonegawa*, the petitioner is a relatively new business, and the petitioner was not in business for an extended period of time before filing the labor certification. The petitioner has not provided any evidence of its sound business reputation or renown within the industry; and the petitioner has not documented its historic growth or an uncharacteristic business expense. Additionally, it is unclear that the Schedule Cs submitted relate to the petitioning business as the tax identification number is different than that listed on the certified labor certification. 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.

Beneficiary's Qualifications for the Position Offered

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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a high school diploma and 24 months of experience in the position offered, alteration tailor. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an alteration tailor with [REDACTED] in Incheon, South Korea, from March 1, 1999, to August 25, 2004.

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 "Confirmation of Employment," dated February 27, 2005, from the president of [REDACTED] on company letterhead. The letter indicates the beneficiary by name and national identification number. The letter states that the beneficiary was employed as a "tailor" from March 1, 1999 to "Current*," with the asterisk stating that, as of the letter's date, the beneficiary was "on a personal leave of absence." Nothing in the record indicates when or if the beneficiary returned to employment with [REDACTED] and [REDACTED]. The letter does not indicate when this leave of absence commenced. Additionally, employment until 2005 conflicts with the beneficiary's claimed dates of employment on ETA Form 9089. Therefore, the AAO is unable to determine the length of the beneficiary's employment, and cannot ascertain if the beneficiary possessed 24 months of experience in the position offered as of the priority date. Further, the letter does not provide a description of the beneficiary's job duties. This letter fails to meet the regulatory requirements for an experience letter. *See* 8 C.F.R. §

204.5(g)(1) and (l)(3)(ii)(A) (experience letters must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary). 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.

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).

Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.