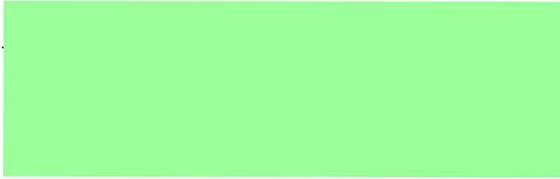




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE **JUL 25 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,

Perry Rhew
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 motel business. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 15, 2009 denial, the single 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 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 February 22, 2007. The proffered wage as stated on the ETA Form 9089 is \$23.68 per hour (\$49,254.40 per year). The ETA Form 9089 states that the position requires two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on March 12, 2009, 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 that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2007 or subsequently.

The director noted in his denial that USCIS records indicate that the petitioner has filed more than one Form I-140, Immigrant Petition for Alien Worker. 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). Counsel states in its brief submitted with the appeal that, "In addition to the petition filed on behalf of Beneficiary, currently,

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).

there are two I-140 petitions pending which were filed by the Petitioner. Of those additional petitions, one has a proffered wage of \$22,732, and another has a proffered wage of \$12,501.” Therefore, the petitioner needs to demonstrate its ability to pay the proffered wage of the beneficiary as well as this additional amount of wages to other employees of \$35,233.

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 March 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; however, it has been submitted into the record. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2004, 2005, 2006, 2007, and 2008, as shown in the table below.²

- In 2004, the Form 1120S stated net income³ of \$30,246.00.
- In 2005, the Form 1120S stated net income of \$26,711.00.
- In 2006, the Form 1120S stated net income of \$72,910.00.
- In 2007, the Form 1120S stated net income of \$62,099.00.
- In 2008, the Form 1120S stated net income of \$45,634.00.

Therefore, for the years 2004, 2005, 2006, 2007, and 2008, the petitioner did not have sufficient net income to pay the proffered wage of \$49,254.40 to the beneficiary as well as the \$35,233.00 of additional proffered wages to the other beneficiaries mentioned by counsel in his brief (\$49,254.40 + \$35,233.00 = \$84,487.40 in total proffered wages).

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

² As the Forms W-2 submitted from 2004, 2005, and 2006 cover a period prior to the priority date of February 22, 2007, it is not necessarily dispositive of the petitioner's ability to pay the proffered wage as of the priority date but may be considered generally.

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 23 (1997-2003), 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 June 25, 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 deductions shown on its Schedule K for 2004 through 2008, the petitioner's net income is found on Schedule K of its tax returns.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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 2004, 2005, 2006, 2007, and 2008, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$7,477.00.
- In 2005, the Form 1120S stated net current assets of \$2,733.00.
- In 2006, the Form 1120S stated net current assets of \$5,405.00.
- In 2007, the Form 1120S stated net current assets of \$18,470.00.
- In 2008, the Form 1120S stated net current assets of \$9,556.00.

Therefore, for the years 2004, 2005, 2006, 2007, and 2008, the petitioner did not have sufficient net current assets to pay the proffered wage as well as the additional proffered wages of \$35,233.00 which counsel mentions in his brief.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts on appeal that: 1) the petitioner incurred various discretionary and extraordinary expenses in 2007 and 2008 which were unusual and which won't be repeated in other years, thus the findings of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) indicate that the petitioner has the ability to pay the proffered wage; 2) USCIS should consider other measures of financial strength such as the Current Ratio or its cash flow as indicated in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009); and 3) the income from expected future increases in business indicate the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner paid \$48,000 for parking lot resurfacing in 2008; \$9,000 and \$22,500, respectively in 2007 and 2008 for management compensation as well as a \$23,438.89 discretionary distribution shared among the officers; \$3,000 to \$4,000 to replace six air-conditioners in 2008; and \$30,000 in loan repayments to [REDACTED] in 2008.

The AAO notes that an invoice and a letter from [REDACTED] were submitted for the parking lot resurfacing indicating that the work was paid for in November of 2007 rather than 2008 as counsel has stated. The petitioner submitted Forms 1099 and payroll registers indicating payments of \$22,500 in 2008 and \$9,000 in 2007 from the petitioner to [REDACTED] the 90%

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.

owner of the business. The record also contains a copy of an affidavit from [REDACTED] listing the discretionary or unusual expenses incurred in 2007 and 2008. The petitioner also submitted a copy of a check stub indicating \$30,000 paid to [REDACTED] which it asserts was a loan repayment which was discretionarily made in 2008. However, the payments made to [REDACTED] in 2007 and 2008 were not listed on the relevant tax returns as compensation of officers. The evidence in the record does not sufficiently demonstrate why the income was paid, and if it was paid as officer compensation, why it was not included as such on the 2007 and 2008 tax returns. Further, the record does not contain probative evidence that the owners of the corporation are financially able to forego such payments in order to pay the beneficiary's salary. In addition, the record does not contain probative evidence of the air-conditioners purchased and their cost as well as proof of the average number of such units normally replaced each year, which counsel claims is one to two. Without evidence of the actual cost of these units as well as evidence that these costs were not a usual occurrence or common expense, the AAO does not find the petitioner's assertions persuasive that these amounts represent additional funds normally available to pay the proffered wage. The AAO also notes that the check stub for the payment to [REDACTED] is not supported by a copy of the check or other evidence sufficient to demonstrate that the funds were actually paid. Moreover, the record does not include copies of loan agreements or contracts which establish the existence of the loan or that the timing of the repayment was discretionary. Therefore, the AAO does not find the assertions persuasive that the \$30,000 payment to [REDACTED] should be considered as additional funds available to pay the proffered wage.

Counsel asserts that USCIS should consider alternate means of assessing the petitioner's ability pay, more specifically, the petitioner's Current Ratio as well as its cash flow as cited in *Construction and Design Co. v. USCIS*. Counsel claims that the current ratio, current assets/current liabilities, shows that the petitioner has the ability to pay the proffered wage in each relevant year. Financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. The current ratio is a financial ratio that measures whether or not a company has enough resources to pay its debts over the next 12 months. It is an indication of a company's liquidity and its ability to meet creditors' demands. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is a useless piece of information.⁵

⁵ The observation that a particular ratio is high or low depends on the purpose for which the ratio is being observed. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital. See *Financial Ratio Analysis*,

While counsel asserts that the current ratio shows the petitioner has the ability to pay the proffered wage, he provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. In addition, he has not provided any authority or precedent decisions to support the use of current ratios in determining the petitioner's ability to pay the proffered wage. Moreover, because the current ratio is not designed to demonstrate an entity's ability to take on the additional, new obligations such as paying an additional wage, this office is not persuaded to rely upon it.

The AAO also notes that Judge Posner stated in *Construction and Design Co. v. USCIS* that "[i]f the firm has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can 'afford' that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure." In the instant case, the petitioner has not sufficiently demonstrated cash flow through its tax returns to be able to pay the salary along with its other expenses, and no audited financial statements have been submitted.

As previously discussed, the AAO notes that: 1) the payments made to [REDACTED] in 2007 and 2008 were not listed on the relevant tax returns as compensation of officers; 2) the evidence in the record does not sufficiently make clear why the income was paid; and 3) the record does not contain probative evidence that the owners of the corporation are financially able to forego such payments in order to pay the beneficiary's salary. The AAO further notes that even if the claimed amounts of managerial payments to [REDACTED] were redirected and available to pay the beneficiary, alone they would be insufficient to cover the proffered wage of the other two employees mentioned by counsel in his brief as well as the proffered wage of the beneficiary as shown in the table below.

	2007	2008
Beneficiary's Proffered Wage	\$49,254.40	\$49,254.40
Other Proffered Wages	\$35,233.00	\$35,233.00
<u>Total Wages To Pay</u>	<u>\$84,487.40</u>	<u>\$84,487.40</u>
Net Income + Claimed Management Compensation	\$71,099.00	\$68,134.00
Shortfall	\$13,388.40	\$16,353.40

In regard to the petitioner's expected future profits, the petitioner submitted invoices for new microwave ovens it states will bring in additional business after installation, online articles about the economic activity of a nearby [REDACTED] facility which lists [REDACTED] among twelve local communities which will be affected, and evidence of an energy company employee staying at the motel for an extended stay.

<http://www.finpipe.com/equity/finratan.htm> (accessed March 28, 2011); *Financial Management, Financial Ratio Analysis*, <http://www.zeromillion.com/business/financial/financial-ratio.html> (accessed March 28, 2011).

The AAO notes that the expense of the parking lot resurfacing in 2007 was substantial and is an expense unlikely to be repeated in each year. In addition, the impact of the energy facility is relevant, and thus these two issues may be considered in a totality of circumstances analysis below.

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 ETA Form 9089 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's gross receipts varied and did not show substantial growth. The petitioner has been in business approximately 11 years, and the wages paid are not substantial. The petitioner indicated on the Form I-140 that it employs six people, and the tax returns do not reflect officer compensation. The petitioner did not submit evidence sufficient to demonstrate that the owners were willing and able to forego officer compensation in order to pay multiple beneficiaries their proffered wages. The record does contain evidence of an expense paid for a parking lot resurfacing in 2007 of \$48,000. The AAO notes that such an expense is not a frequent occurrence for a business, but it is a common expense and not any more unexpected than are other normal maintenance issues involved with operating a motel business. Such expenses are usually accounted for on the tax returns over time, and thus do not represent additional amounts apart from the tax returns which would be available for paying the beneficiary's salary. Rather, if the petitioner demonstrated the ability to pay the proffered wage in several years, but was unable to demonstrate through its tax returns that it had adequate funds in a single year due to an unexpected expense, then

it would be reasonable to construe in the context of a totality of circumstances analysis that the petitioner might still have the ability to pay the proffered wage. However, in the instant matter, the petitioner was unable in any single year to demonstrate that it possessed the ability to pay both the beneficiary's proffered wage and the proffered wages of other beneficiaries for which it filed immigrant petitions.

The record also contains evidence that an energy facility has been constructed nearby and that the city in which the petitioner is located will be among at least twelve small cities which are impacted. The AAO notes that it is reasonable to expect an impact if a large business is established nearby. However, in the instant case, the petitioner fails to provide sufficient evidence of the specific expected economic impact to its business. The submission of a room invoice for an energy facility worker is insufficient absent statistical data showing overall impacts to vacancy rates and to the petitioner's income. The record does not contain probative evidence such as expert opinion letters, historical economic data outlining similar impacts to motel businesses, or economic data specific to this petitioner or its industry. In addition, there is no evidence in the record of the historical growth of the petitioner's business or of the petitioner's reputation within its industry. 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, the petitioner has also not established 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).

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 two years in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on

experience as a manager working 40 hours per week at a [REDACTED] from July 19, 2000 until February 22, 2007, and as a manager at [REDACTED] from August 14, 1999, to April 18, 2000.

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 March 5, 2009, from [REDACTED] Manager of [REDACTED] letterhead stating that the beneficiary worked for the hotel in [REDACTED]. The letter does not state the beneficiary's title, list his job duties, state whether the employment was full-time, or give the dates of employment. The record also contains a letter from [REDACTED] President, on [REDACTED] letterhead dated August 7, 2007, stating that the beneficiary worked as a manager from December 2004 to July 2007. The letter lists the beneficiary's duties as manager.

The AAO notes that the letter dated March 5, 2009, is not acceptable evidence of the beneficiary's experience as it does not contain the dates of employment or any additional description of his duties, and thus does not meet the requirements of *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter dated August 7, 2007, fails to state whether the employment was full-time, and the letter contains dates of employment which conflict with the dates set forth on ETA Form 9089 for this employer.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The decision further states that: "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."

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.