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



U.S. Citizenship
and Immigration
Services

Date:

JUN 25 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:

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 with the field office or service center that originally decided your case by filing a 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: On May 31, 2007, the petitioner's Form I-140 Immigrant Petition for Alien Worker was initially approved by the Director, Texas Service Center. On August 20, 2007, the director served the petitioner with Notice of Intent to Revoke the approval of the petition. On May 3, 2008, the director issued a Notice of Revocation of the approval of the immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). The appeal will be dismissed.

The petitioner is a fine art packing and transport company. It seeks to employ the beneficiary permanently in the United States as a manager of fine art crating. 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 revoked the previously approved petition accordingly.

The record shows that the appeal is properly filed 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.

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

As set forth in the director's May 3, 2008 revocation, 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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members

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).

of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that “the term ‘profession’ shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”

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 28, 2001. The base pay on the Form ETA 750 is \$61,318 per year. However, the labor certification also states the beneficiary will be working five (5) hours of overtime per week, at a rate of \$30.00 per hour. This is an additional \$7,800 added to the annual proffered wage, making the total proffered wage on the ETA 750 \$69,118 per year. The Form ETA 750 states that the position requires a 4 year Bachelor Degree in Arts and Humanities/General Studies; and 2 years and 6 months of training in crating and packing or, 2 years 6 months of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation.² On the petition, the petitioner claimed to have been established in 1994 and to currently employ 30 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a fiscal year from November 1 to October 31³. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner as a packer/crater in the fine arts

² At the time the labor certification was filed in 2001, the petitioner was a C corporation. The petitioner then changed to an S corporation on November 1, 2006. There was also a change of ownership in 2004, which will be discussed later in this decision.

³ At the time of filing the labor certification, the petitioner's C Corporation's tax returns were based on a fiscal year running from June 1 to May 31. When the company changed ownership in 2004, the new company's first tax year was based on a fiscal year running from November 30 to October 31. In 2005, the new ownership's fiscal year then began to run from November 1 to October 31.

department from January 1998 to July 2000, and as a manager in the fine arts crating department from July 2000 to the present.

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 Sonegawa*, 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 established that it employed and paid the beneficiary wages during the relevant timeframe including the period from the priority date in 2001 and subsequently.

The beneficiary's W-2 Forms demonstrate Wages, Tips, Other Compensation paid to the beneficiary by the petitioner,⁴ and the subsequent owner, as shown in the table below.

- In 2001, the Form W-2 stated wages, tips, other compensation of \$48,316.32.
- In 2002, the Form W-2 stated wages, tips, other compensation of \$54,900.60.
- In 2003, the Form W-2 stated wages, tips, other compensation of \$56,579.11.
- In 2004, the Form W-2 stated wages, tips, other compensation of \$57,214.01.
- In 2005, the Form W-2 stated wages, tips, other compensation of \$61,241.85.
- In 2006, the Form W-2 stated wages, tips, other compensation of \$64,281.16.
- In 2007, the Form W-2 stated wages, tips, other compensation of \$68,859.75.
- In 2008, the Form W-2 stated wages, tips, other compensation of \$73,099.82.
- In 2009, the Form W-2 stated wages, tips, other compensation of \$74,836.86.

Therefore, for the years 2001 through 2007, the petitioner did not pay the beneficiary an amount at least equal to the proffered wage.

⁴ The AAO notes that the Forms W-2 from 2001 to 2004 reflect wages paid by the petitioner. The Forms W-2 for 2005 to 2009 reflect wages paid by [REDACTED] with a taxpayer identification number of [REDACTED].

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 closed on September 3, 2010 with the receipt by the AAO of the petitioner’s submissions of documents and its appellant brief. As of that date, the petitioner’s 2010 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2009 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2000 through 2009, as shown in the table below.⁵

- In 2000, the Form 1120 stated net income⁶ of \$-0- (for period from June 1, 2000 to May 31, 2001.
- In 2001, the Form 1120 stated net income of -\$40,584 (for period from June 1, 2001 to May 31, 2002.
- In 2002, the Form 1120 stated net income of \$39, 574 (for period from June 1, 2002 to May 31, 2003.
- In 2003, the Form 1120 stated net income of -\$25,114 (for period from June 1, 2003 to May 31, 2004.
- In 2004, the Form 1120 stated net income of \$47,389 (for period from June 1, 2004 to May 31, 2005.⁷
- In 2004, the Form 1120 stated net income of -\$166,465 (for period from November 30, 2004 to October 31, 2005.⁸
- In 2005, the Form 1120 stated net income of \$187,106 (for period from November 1, 2005 to October 31, 2006.
- In 2006, the Form 1120S stated net income of \$10,796 (for period from November 1, 2006 to October 31, 2007.

⁵ The tax returns summarized include those of the petitioner, and of the new organization.

⁶ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. 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 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 30, 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 shown on its Schedule K for 2006, 2008, and 2009, the petitioner’s net income is found on Schedule K of its 2006, 2008, and 2009 tax returns.

⁷ This was the petitioner’s final tax return before it changed ownership.

⁸ This was the new owner’s first federal tax return after becoming incorporated on November 30, 2004.

- In 2007, the Form 1120S stated net income of -\$74,315 (for period from November 1, 2007 to December 31, 2007).⁹
- In 2008, the Form 1120S stated net income of \$229,958.
- In 2009, the Form 1120S stated net income of -\$ 16,110.

Therefore, for petitioner's fiscal years 2001, 2002,¹⁰ 2003, 2004,¹¹ 2007, or 2009, the petitioner and/or the new company did not have sufficient net income and/or combined net income and wages paid 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.¹² A corporation's year-end current assets are shown

⁹ The new owner changed its fiscal year to a calendar year.

¹⁰ As noted above, the Form W-2 for 2002 shows that the petitioner paid the beneficiary \$54,900.60 during calendar year 2002. The petitioner's tax return for 2002 shows net income of \$39,574. However, the 2002 Form W-2 relates to the calendar year, whereas the 2002 tax return relates to the petitioner's fiscal year which runs from June 1, 2002 to May 31, 2003. Thus, determining the petitioner's ability to pay in 2002 is not simply a matter of combining the net income from the 2002 tax return and the wages listed on the 2002 Form W-2. It is not clear how much, if any, of the petitioner's 2002 net income is attributable to calendar year 2002; thus, it is not clear how much, if any, of the petitioner's net income was available to pay the proffered wage in 2002. The record is devoid of evidence establishing that enough of this net income was available in calendar year 2002, and not in the first half of calendar year 2003, to make up the difference between the proffered wage and the wage actually paid to the beneficiary in 2002. Accordingly, the petitioner has failed to establish its ability to pay the proffered wage in either calendar year 2002 or fiscal year 2002. In any other further filings, the petitioner would need to submit monthly income statements to match the beneficiary's W-2s against the fiscal year.

¹¹ As noted above, the Form W-2 for 2004 shows that the petitioner paid the beneficiary \$57,214.01 during calendar year 2004. The petitioner's tax return for 2004 shows net income of \$47,389. However, the 2004 Form W-2 relates to the calendar year, whereas the 2004 tax return relates to the petitioner's fiscal year which runs from June 1, 2004 to May 31, 2005. Thus, determining the petitioner's ability to pay in 2004 is not simply a matter of combining the net income from the 2004 tax return and the wages listed on the 2004 Form W-2. It is not clear how much, if any, of the petitioner's 2004 net income is attributable to calendar year 2004; thus, it is not clear how much, if any, of the petitioner's net income was available to pay the proffered wage in 2004. The record is devoid of evidence establishing that enough of this net income was available in calendar year 2004, and not in the first half of calendar year 2005, to make up the difference between the proffered wage and the wage actually paid to the beneficiary in 2004. Accordingly, the petitioner has failed to establish its ability to pay the proffered wage in either calendar year 2004 or fiscal year 2004. In any other further filings, the petitioner would need to submit monthly income statements to match the beneficiary's W-2s against the fiscal year.

¹² 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,

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 and new owner's tax returns demonstrate its end-of-year net current assets for 2000 through 2009, as shown in the table below.

- In 2000, the Form 1120 stated net current assets of -\$103,045 (for period from June 1, 2000 to May 31, 2001).
- In 2001, the Form 1120 stated net current assets of -\$157,819 (for period from June 1, 2001 to May 31, 2002).
- In 2002, the Form 1120 stated net current assets of -\$88,584 (for period from June 1, 2002 to May 31, 2003).
- In 2003, the Form 1120 stated net current assets of -\$180,738 (for period from June 1, 2003 to May 31, 2004).
- In 2004, the Form 1120 stated net current assets of \$-0- (for period from June 1, 2004 to May 31, 2005).¹³
- In 2004, the Form 1120 stated net current assets of -\$255,571 (for period from November 30, 2004 to October 31, 2005).¹⁴
- In 2005, the Form 1120 stated net current assets of \$305,561 (for period from November 1, 2005 to October 31, 2006).
- In 2006, the Form 1120S stated net current assets of -\$62,308 (for period from November 1, 2006 to October 31, 2007).
- In 2007, the Form 1120S stated net current assets of -\$50,275 (for period from November 2007 to December 31, 2007).¹⁵
- In 2008, the Form 1120S stated net current assets of \$163,977.
- In 2009, the Form 1120S stated net current assets of -\$ 65,468.

Therefore, for petitioner's fiscal years 2000 through 2004, 2006, 2007, and 2009, the petitioner and/or did not have sufficient net current assets to pay the proffered wage. The new company would have had sufficient net current assets to pay the proffered wage in fiscal year 2005.

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.

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.

¹³ This was the petitioner's final tax return before it changed ownership.

¹⁴ This was the new owner's first federal tax return after becoming incorporated on November 30, 2004.

¹⁵ The new owner changed its fiscal year to a calendar year.

In addition, according to USCIS records, the petitioner has filed two I-140 petitions on behalf of other beneficiaries. 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 each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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 submitted a summary for each year to establish the petitioner's ability to pay. However, counsel is using the incorrect prevailing wage of \$61,318, as opposed to the prevailing wage of \$69,118, which includes the overtime to be worked by the beneficiary.

Counsel incorrectly asserts that the tax returns to be considered start by pro-rating 2001. The priority date in the instant case is April 28, 2001, and at that time, the petitioner was on a fiscal year which ran from June 1 to May 31. Therefore, the tax year of June 1, 2000 to May 31, 2001 is also reviewed as it encompasses the priority date of April 28, 2001. We will not 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 also asserts that the petitioner's gross income, discretionary income paid to officers, repayment of loans to shareholders, and prepayment of loans due all establish the petitioner had the ability to pay the proffered wage. However, as discussed above, gross profits overstate an employer's ability to pay because it ignores other necessary expenses. The petitioner failed to submit evidence to show that officer compensation payments were not fixed by contract or otherwise. Counsel also failed to submit evidence of the claimed repayment to shareholders, or that the "pre-payments" of loans due were actual "prepayments" and not just regular payments. Without such evidence, the AAO does not find counsel's claim persuasive. 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, 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 will be considered below in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's gross receipts, net current assets, and officer compensation all declined in 2009. Further, the petitioner has not submitted evidence establishing the number of its employees, the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or whether the beneficiary will be replacing a former employee or an outsourced service. 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.

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).

Beyond the decision of the director, a labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity.¹⁶ *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

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

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the petitioner to [REDACTED]. Additionally, the record does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects. Accordingly, the petition must also be denied because the petitioner has failed to establish that a successor-in-interest to the petitioner/labor certification employer existed.

Additionally, 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*

¹⁶ The petitioner on the Form I-140 and the appellant as stated on the Form I-290B are the same. However, the New York State, Department of State records show the petitioner [REDACTED] dissolved as of September 12, 2005. The New York State, Department of State records also shows a new entity by the name [REDACTED] came into existence on November 20, 2004. The new entity is located at the same address, and has many of the same shareholders as the predecessor company. The federal tax returns submitted reflect this change in ownership by both the name change and the change in the federal employment identification number.

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 four year Bachelor Degree in Arts and Humanities, or General Studies, and 2 years and 6 months of on-the-job training/experience crating and packing or 2 years and 6 months experience in the offered job. The special requirements listed in the Part A. Item 15, state the position requires, "a minimum of two years and six months of experience or training under the supervision of experienced packers and craters of fine art works. Position requires management of a staff of 10 professional packers and craters."

On the labor certification, the beneficiary claims to qualify for the offered position based on a Baccalaureate degree from [REDACTED] completed in 1991. The record contains a copy of the beneficiary's diploma with certified translation from [REDACTED] issued in 1991. No transcripts were submitted.

The certified translation of the beneficiary's diploma states that he "completed the full course of study in the area of international economics and business management." Therefore, the beneficiary does not possess a bachelor's degree in art and humanities/general studies as required in section 14 on Form ETA 750A. The evidence in the record does not establish that the beneficiary possessed the required education 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.

Additionally, on the labor certification, the beneficiary claims to qualify for the offered position based on experience as a packer/crater, from January 1998 to July 2000 for the petitioner. The beneficiary then worked for the petitioner in the position of manager, fine art crating department from July 2000 to the present.

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(1)(3)(ii)(A). The record contains a letter from [REDACTED] Art Preparator with [REDACTED] stating the beneficiary volunteered as an assistant in exchange for instruction in the field of fine art packing and handling "a few days a week" from April 1997 to June 1999. The letter also states the beneficiary helped with three exhibitions, and assisted [REDACTED] with some of the day to day business of an arts studio by packing, unpacking, handling and registering works of art.

The beneficiary did not list [REDACTED] on the labor certification as an employer where he gained experience in the proffered position. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Additionally, this training/experience gained by the beneficiary was not full-time employment, and was for two years and two months, not two years and six months.

In summary, the petitioner must establish that the beneficiary meets all of the requirements of the job offered by the priority date, including the "other special requirements" for the offered position set forth at Part A, Items 15 of Form ETA 750. The evidence in the record does not establish that the beneficiary possessed the training and/or experience as of the priority date.

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.