

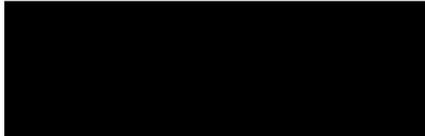
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE:

JAN 7 0 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a farm. The petitioner seeks to classify the beneficiary as a maintenance and repair worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner failed to demonstrate a continuing ability to pay the proffered wage beginning on the priority date.

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 denial dated May 8, 2008, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$32,703.00 per year. The Form ETA 750 indicates 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 a multi-member limited liability company (LLC).² On the Form ETA 750, signed by the beneficiary, the beneficiary claims to have been employed by the petitioner since June 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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. Comm. 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. Comm. 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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

² A limited liability company (LLC) is an entity formed under state law by filing articles of organization. A limited liability company may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

The record of proceeding contains copies of IRS Forms W-2, Wage and Tax Statements prepared by [REDACTED] Federal Employer Identification Number (EIN) [REDACTED], which differs from that of the petitioner. On appeal, counsel asserts that the petitioner hired [REDACTED] as a payroll disbursement company. Counsel submits as evidence a letter from a representative of the petitioner who stated that the petitioner did enter into a co-employment relationship with [REDACTED] and that the company has administered payroll functions for the petitioner. Counsel also provides a copy of [REDACTED] [REDACTED] Articles of Incorporation and Property Management Agreement. The proffered annual wage in this case is \$32,703.00. The petitioner submitted copies of Forms W-2 issued by a company other than the petitioner for the 2002, 2003, 2004, 2005, 2006, and 2007 tax years as shown in the table below.

- In 2002, the IRS Form W-2 stated total wages of \$38,575.00.
- In 2003, the IRS Form W-2 stated total wages of \$22,700.00 (a deficiency of \$10,003.00).
- In 2004, the IRS Form W-2 stated total wages of \$24,400.00 (a deficiency of \$8,303.00).
- In 2005, the IRS Form W-2 stated total wages of \$26,425.00 (a deficiency of \$6,278.00).
- In 2006, the IRS Form W-2 stated total wages of \$28,975.00 (a deficiency of \$3,728.00).
- In 2007, the IRS Form W-2 stated total wages of \$29,970.00 (a deficiency of \$2,732.76).

Contrary to counsel's claim, the record of proceeding does not contain sufficient documentation to establish that the payments to the beneficiary from [REDACTED] [REDACTED] are as a result of the beneficiary being employed by the petitioner or, just as important, that the wages paid to the beneficiary represents funds originating with the petitioning limited liability company. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has failed to provide evidence to demonstrate that [REDACTED] serves as its payroll company and not as the beneficiary's employer; therefore, the W-2, Wage and Tax Statements, submitted by the petitioner for the 2002, 2003, 2004, 2005, 2006, and 2007 tax years cannot be considered as evidence of the petitioner's ability to pay the proffered wage. Regardless, even assuming that the Forms W-2 were persuasive evidence, in subtracting the total claimed wage amounts from the proffered wage, it is determined that the petitioner has failed to demonstrate its ability to pay the proffered wage since the priority date. Only in 2002 was the beneficiary paid more than the proffered wage, albeit not by the petitioner.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the designated period, then 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). 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 proffered wage is \$32,703.00. The petitioner's Form 1065 for 2006 is the most recent tax return submitted as evidence for the petitioner. The petitioner's federal income tax returns Forms 1065³ stated its net income as detailed below.

- In 2001, the Form 1065 stated net income of -\$189,425.00.
- In 2002, the Form 1065 stated net income of -\$201,197.00.
- In 2003, the Form 1065 stated net income of -\$188,700.00.
- In 2004, the Form 1065 stated net income of -\$217,884.00.
- In 2005, the Form 1065 stated net income of -\$223,969.00.
- In 2006, the Form 1065 stated net income of -\$216,462.00.

Therefore, for the years 2001, 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner also did not have sufficient net income to pay the proffered wage in 2002 given the lack of persuasiveness of the Form W-2 for 2002. *See supra*.

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 An LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If the total of a LLC'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. Although counsel asserts that net current assets were not correctly calculated, there has been nothing presented to substantiate such claim. There is no evidence that the regulations were violated in calculating the petitioner's net current asset amounts for 2001 through 2006. Therefore, the petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2001, the Form 1065 stated net current assets of -\$583,655.
- In 2002, the Form 1065 stated net current assets of -\$784,754.00.

³ For an LLC, where an LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In this matter, the director failed to use the figures on line 1 of the Analysis of Net Income (loss) of the Schedule K.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2003, the Form 1065 stated net current assets of -\$957,232.00.
- In 2004, the Form 1065 stated net current assets of -\$1,171,365.00.
- In 2005, the Form 1065 stated net current assets of -\$1,408,173.00.
- In 2006, the Form 1065 stated net current assets of \$4,251.00.

Therefore, for the years 2001 through 2006, the record shows that the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.⁵

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records, and that the petitioner has provided evidence sufficient to show that it has the ability to pay the proffered wage. Counsel further asserts that USCIS must consider the totality of the circumstances in its determination of the petitioner's ability to pay the proffered wage. Counsel also asserts that the LLC members' assets should be considered in determining the petitioner's ability to pay the proffered wage.

On appeal, the petitioner asserts that the business entity is a limited liability partnership (LLP) and that as an LLP, the members/manager's assets and personal liabilities may be considered in determining the petitioner's ability to pay the proffered wage. The petitioner further asserts that Part II, Sec I, Form 1065 K-1 should have been marked with an "X" in the box "General Partner or LLC Member — Manager." The petitioner further asserts that the owners have sufficient personal assets and own other enterprises sufficient in value to pay the proffered wage.

Contrary to counsel's claim, the evidence of record (including the petitioner's Forms 1065 tax returns) demonstrate that it is a Limited Liability Corporation (LLC), and it is an elementary rule that an LLC or a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Furthermore, a petitioner may not make material changes to a petition or evidence in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Consequently, the personal assets or other enterprises or corporations cannot be considered in determining the petitioning LLC's ability to pay the proffered wage. The court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *See Sitar v. Ashcroft*, 2003 WL 22203713

⁵ It is noted that, even if the wages paid by [REDACTED] in 2003, 2004, and 2005 were considered by the AAO, [REDACTED] Forms 1065 do not establish that this entity had the ability to pay the difference between the wages paid and the proffered wage through its net income or net current assets in those years.

(D.Mass. Sept. 18, 2003). Therefore, USCIS may not look to the assets of the LLC's owners or of other entities to satisfy the LLC's ability to pay the proffered wage.⁶

Counsel asserts that the director did not correctly calculate the petitioner's net current assets and considered funds invested as capital as current liabilities. Contrary to counsel's contention, the AAO notes that the petitioner is listed in the State of Maryland Department of Assessments and Taxation as a limited liability corporation. And as such, the LLC member's liability is limited to their initial investment.

Counsel asserts on appeal that the value of the petitioner's farm house and acreage should be considered in determining the petitioner's ability to pay the proffered wage. Contrary to counsel's claim, real estate is not a readily liquefiable asset. Further, it is unlikely that the petitioner would sell such significant assets to pay the beneficiary's wage. It is speculative to claim that funds from the sale of real property would be available specifically to be used to pay the proffered wage. *See generally Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, any funds which may be generated from the sale of any of the real property would only be available at some point in the future. A petitioner must establish its ability to pay from the date of the priority date, which in this case is April 27, 2001. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 45. Regardless, these assets do not appear to belong to the petitioner.

On appeal, counsel asserts that the petitioner paid the beneficiary's rent and noncash benefits in addition to his salary. Counsel further asserts that when the noncash benefit amounts are computed with the wages paid to the beneficiary, the total amount exceeds the proffered wage during the relevant years. In the statement submitted on appeal, the petitioner lists the beneficiary's housing, utilities, telephone, health insurance, and transportation expenses allegedly being paid for by the petitioner. The petitioner submits copies of utility bills in support of this statement. Contrary to counsel's claim, the rent and other noncash benefits allegedly paid on behalf of the beneficiary is not considered wages, and therefore, cannot be used to assess the petitioner's ability to pay the proffered wage. "The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage." *See* 20

⁶ Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a multi-member limited liability company.

C.F.R. § 656.20(c)(3). Furthermore, the petitioner has not presented sufficient evidence to demonstrate that the beneficiary was being paid wages by the petitioner, or that he was even employed by the petitioner, or that any of these noncash benefits were actually paid by the petitioner.

Counsel infers that the petitioner has gross income and gross assets that are equal to or greater than the proffered wage. However, reliance on gross income or gross assets is misplaced. *See e.g. Taco Especial*. Such a calculation would overstate the petitioner's ability to pay by ignoring expenses and other obligations or liabilities.

On appeal, counsel asserts that the director erred in not properly assessing the evidence which demonstrated the petitioner's ability to pay the proffered wage. Counsel further asserts that when taken into consideration, other sources of income such as shareholder's assets are amounts that are sufficient to demonstrate the petitioner's continuing ability to pay the beneficiary the proffered wage. The petitioner submitted as evidence copies of the members' income tax returns, unaudited balance sheets, and personal investment account statements.

Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the LLC's owner to satisfy the LLC's ability to pay the proffered wage. It is an elementary rule that a corporation or LLC is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders/members or of other enterprises or corporations cannot be considered in determining the petitioning LLC's ability to pay the proffered wage.

Counsel cites *Matter of X*, 31 Immigration Case Reporter B2-13, WAC 02 092 50574 (AAO Nov. 22, 2004), a farm case in which counsel stated that the AAO had acknowledged that the petitioner focused more on the sport of horse racing than on turning a profit. However, other than noting that the petitioner in the cited case also operated a business similar to the business operated by the petitioner in the instant matter, counsel did not establish that the facts of the two cases are analogous. In fact, in the instant matter, the petitioner has failed to provide sufficient evidence that it was able to pay the proffered wage in seven out of eight years; unlike in the *Matter of X* case where the petitioner was found to provide sufficient evidence of its ability to pay the proffered wage for all but one of the relevant tax years. Although the reasoning underlying an AAO decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. Counsel's reference to the *Matter of X* decision is not persuasive.

Counsel's assertions and the evidence presented on appeal do not outweigh the evidence of record 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. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534

(BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 as is stated here or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In 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 petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The petitioner has not established that the relevant years were uncharacteristically unprofitable years or difficult periods for its business. The petitioner has also not established its reputation within the industry or whether the beneficiary is replacing as an employee or outsourced service. Based upon the evidence submitted, the petitioner did not establish that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not established that the beneficiary meets the qualifications set forth on the Form ETA 750. According to the Form ETA 750, the position requires two years of experience as a maintenance and repair worker. The petitioner submitted an employment letter from [REDACTED] who stated that her farm employed the beneficiary from October 30, 1993 to June 1, 1999, and that his "duties included repair of all equipment including maintenance of tractors and operation." However, the beneficiary stated under penalty of perjury on the Form ETA 750B that he was employed on the declarant's farm from July 1997 through June 1999. The inconsistencies and contradictions cast doubt on the petitioner's proof. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and

sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Furthermore, the declarant fails to specify the beneficiary's job title or the number of hours he worked per week. Accordingly, it has not been established that the beneficiary has the requisite two years of job experience for the proffered position. 8 C.F.R § 204.5(g)(1) and (1)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 27, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The appeal will be dismissed for this additional reason. 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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.