

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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**



B6

Date: **MAY 01 2012**

Office: TEXAS SERVICE CENTER

FILE: 

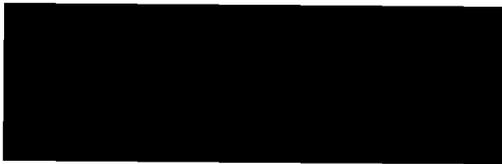
IN RE:

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 retail store selling business machines such as cash registers, video surveillance systems, and all types of scales, among other things.¹ It seeks to employ the beneficiary permanently in the United States as a retail store manager, business machines. 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 Texas Service Center Director (the director) denied the petition, finding that the petitioner failed to establish by a preponderance of the evidence that it had the ability to pay the proffered wage of the beneficiary beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

On appeal, counsel for the petitioner contends that the petitioner has submitted sufficient evidence to demonstrate that it has the continuing ability to pay the proffered wage from the priority date. Further, citing section 204(j) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1154(j) as amended by section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313), counsel contends that the employment-based petition should remain valid even though the beneficiary no longer works for the petitioner.

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 March 7, 2011 denial, the key 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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.

¹ See <http://www.barlettbusinessmachines.com> (last accessed April 17, 2012).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Further, 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).

In the instant proceeding, the Form ETA 750 was filed for processing and accepted by the DOL on March 6, 2003. The rate of pay or the proffered wage specified on the Form ETA 750 is \$18.62 per hour or \$38,729.60 per year. In the Form ETA 750, the petitioner specifies that all job applicants, including the beneficiary, in order to qualify for the position should have at least two years of work experience in the job offered or in a related occupation as a manager in a retail business or personal service setting.

To show that the petitioner has the continuing ability to pay \$18.62 per hour or \$38,729.60 per year from March 6, 2003, the petitioner submitted the following evidence:

- Copies of Forms 1120, U.S. Corporation Income Tax Return for an S Corporation, for the years 2003 through 2006.

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 1995, to currently employ five people, and to have gross annual income of \$428,565.

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. 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.

No evidence has been submitted to show that the beneficiary is an employee and/or that he has received compensation from the petitioner during the qualifying period. Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must show that it has the ability to pay \$18.62 per hour or \$38,729.60 per year from 2003 until the beneficiary obtains his lawful permanent residence. The petitioner can pay these amounts through either its net income or net current assets.

If the petitioner chooses to use its net income to pay the proffered wage during that period, USCIS will 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).

In adjudicating the petition, the director observed that the petitioner had previously filed one other employment-based immigrant petition (Form I-140) for an alien beneficiary other than the beneficiary in the instant case (file [REDACTED]). If the instant petition were the only one filed by the petitioner, the petitioner would have only been required to demonstrate the ability to pay the proffered wage to the single beneficiary of the instant petition. However, in this case, the petitioner has filed one other petition overlapping the time period for the current petition. Hence, the petitioner, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but *for the other* beneficiary until each receives or received his or her legal permanent residence (LPR).

The director, before issuing the Notice of Decision, issued a Request for Evidence (RFE) on May 24, 2010 advising the petitioner to submit:

- a. Copies of all employment-based petitions filed;
- b. A copy of the labor certification for each filed Form I-140; and
- c. Documentary evidence showing the ability to pay the proffered wages of all beneficiaries.

In response to the director's RFE, counsel stated that the petition was approvable when it was filed. Further counsel referred to the portability provisions of section 204(j) of the Act; 8 U.S.C.

³ The director in the Notice of Decision noted that the priority date for this petition was February 25, 2001 and that the petition was approved on March 16, 2002. The AAO notes that the second sponsored beneficiary received his/her lawful permanent residence on April 22, 2005 and that the petitioner must demonstrate the ability to pay both the beneficiary of the instant petition and the second sponsored beneficiary from the priority date in the present case until April 22, 2005.

§ 1154(j) as amended by section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313) and cited the Michael Aytes Memo, dated December 27, 2005 entitled “Interim Guidance for Processing I-140 Employment-Based Immigrant Petitions and I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313).” Counsel indicated that the beneficiary had ported to work for another employer performing a substantially similar job as the job described in the approved labor certification (Form ETA 750). Further, counsel argued that the petition should remain valid under the portability provisions of section 204(j) of the Act. The evidence of ability to pay requested by the director was not submitted.

Based on the evidence submitted, the petitioner’s net income (loss) for the years 2003 through 2006 are as follows:

- In 2003, the Form 1120S stated net income⁴ of \$29,032.
- In 2004, the Form 1120S stated net income of \$3,656.
- In 2005, the Form 1120S stated net income of \$998.
- In 2006, the Form 1120S stated net income of \$25,945.

Therefore, the petitioner did not have sufficient net income to pay either the beneficiary’s proffered wage in any of the years above or of the wage of the other beneficiary between 2003 and 2005.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁵ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected

⁴ For an S Corporation, 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 if the S corporation’s income is exclusively from a trade or business. 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) line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the net income in is found on line 21 of page one of the Form 1120S.

⁵ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 the years 2003 through 2006, as shown below:

- In 2003, the Form 1120S stated net current assets of \$90,502.
- In 2004, the Form 1120S stated net current assets of \$121,296.
- In 2005, the Form 1120S stated net current assets of \$134,004.
- In 2006, the Form 1120S stated net current assets of \$148,588.

While the net current assets from 2003 to 2006 above are higher than the beneficiary's proffered wage of \$38,729.60 per year, the AAO cannot conclude that the petitioner has the continuing ability to pay the proffered wage from the priority date. The record does not include evidentiary documents relating to the other beneficiary, e.g. his or her Forms W-2 or 1099-MISC and his or her rate of pay or the proffered wage as certified by the DOL.

Finally, 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. 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.

Unlike *Sonogawa*, however, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until each beneficiary receives or received his or her permanent residence.

The director also found under the portability provisions of AC21 that the petitioner is not shielded from establishing that the petition was approvable when filed, e.g. that it had the ability to pay the proffered wage from the priority date through the permanent residence of each sponsored beneficiary. The beneficiary cannot port from an unapproved or unapprovable petition.

The AAO agrees. The portability provisions of section 204(j) of the Act; 8 U.S.C. § 1154(j) as amended by section 106(c) of AC21, do not apply in this case. The petition in this case has **never been approved** by the director. In fact, the petition was denied. Thus, the petition was never valid for porting purposes. The petitioner must continue to demonstrate that it has the continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that the beneficiary no longer intends to work for the petitioning entity provided that:

- 1) The application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days, and
- 2) The new job offer the new employer must be for a "same or similar" job.

The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term "valid," as used in section 204(j) of the Act, refers to an **approved visa petition**.

This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 be approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

In *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), the AAO concludes that even though section 204(j) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(j), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job." *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act. An unadjudicated

immigrant visa petition is not made “valid” merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*

It would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

Applying *Matter of Al Wazzan* to this case, we determine that the petitioner’s burden to establish the ability to pay does not stop when the beneficiary moved jobs. Before issuing his decision, the director advised the petitioner to submit additional evidence to demonstrate the ability to pay from the priority date until each beneficiary obtains or obtained his or her lawful permanent residence. The petitioner has failed to submit the evidence requested. Therefore, we agree with the director that the petitioner has not met its burden in establishing the continuing ability to pay.

On appeal, counsel for the petitioner states that the decision by USCIS is contrary to U.S. policy as expressed in the Yates Memorandum dated December 27, 2005.⁶ Specifically, counsel cited Question 1 of the Memorandum, which states:

How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under §106(c) of AC21?

Answer: If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

- A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.

⁶ Counsel is actually referring to Memorandum from Michael Aytes, Acting Director of Domestic Operations, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P, December 27, 2005.

- B. If a request for additional evidence (RFE) is necessary to resolve a material issue, other than post-filing issues such as ability to pay, an RFE can be issued to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

Applying “Answer A” of the Yates (or the Aytes) Memo above, counsel argues that the petition was approvable had it been adjudicated within 180 days upon filing (approvable when filed).

The AAO declines to accept counsel’s argument as persuasive. First, the AAO is not bound to follow USCIS Memorandums. *Matter of Al Wazzan* is a precedent case in which USCIS including the AAO must abide by. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”) *See also*

Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding “Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service,” dated February 3, 2006. The memorandum addresses, “the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices.” The memo states that, “policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to ‘inform rather than control.’” CRS at p.3 citing to *American Trucking Ass’n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974), “A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy.” The memo notes that “policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power.” *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

Further, even if we apply the Yates Memo (or the Aytes Memo) to this case, we cannot conclude that the petition was approvable when filed. The petitioner, as indicated above, failed to resolve a material issue relating to its ability to pay. The petitioner did not comply with the director's request for evidence, and it continues to ignore the director's request for additional evidence on appeal.⁷ Thus under either *Matter of Al Wazzan* or the Yates (or the Aytes) Memo, the petitioner has not proved that the case is approvable when filed.

Beyond the decision of the director, the AAO finds that the beneficiary does not have the requisite experience in the job offered or in the related occupation, and thus, he is not qualified for the position.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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. 1986). See also, *Madany v. Smith*, 696 F.2d, 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).

Here, as previously noted, the Form ETA 750 was filed and accepted for processing by the DOL on March 6, 2003. The name of the job title or the position for which the petitioner seeks to hire is "Retail Store Manager, Business Machines."

Further, the petitioner set the following requirements under box 14 (the minimum education, training, and experience for a worker to perform satisfactory the job duties described in box 13 above):

Education:	[blank]
Training:	[blank]
Experience:	2 years in the job offered or 2 years in the related occupation.
Related Occupation:	Manager in retail setting or any personal service setting.

⁷ On appeal, counsel states:

Since the petitioner has provided all available tax returns at the time of filing which clearly shows petitioner's ability to pay the proffered wage to the beneficiary in conjunction with the benefits confers by Sec. 204(j), request by USCIS for additional documents to show petitioner's ability to pay is immaterial and redundant and therefore none was provided.

To demonstrate that the beneficiary has the requisite three-year work experience as of the priority date, the petitioner submits:

- A letter dated January 31, 2007 from [REDACTED] stating that the beneficiary was employed as a sales manager on a full-time basis from April 1, 1999 to September 30, 2004 and thereafter on a part-time basis until January 31, 2007 at Maha Travel; and
- A Maha Travel business card with the name and title of the beneficiary.⁸

The evidence submitted above is inconsistent with a letter dated April 2, 2001 from Continental Airlines, Inc., which stated that the beneficiary had been employed by Continental Airlines since August 12, 1998.⁹ 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, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Because the record contains no evidence resolving these inconsistencies in the record pertaining to the beneficiary's past employments, the AAO finds that the beneficiary does not have the requisite work experience in the job offered or in the related occupation and thus, he is not qualified to perform the duties of the position.

The appeal will be dismissed 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.

⁸ The name and title on the business card are Amir Piprani and Sales Manager, respectively.

⁹ It is not clear what the beneficiary did or what his job title was at the Continental Airlines, Inc. The AAO further notes that the beneficiary did not list his job at the Continental Airlines, Inc. on the Form ETA 750, part B.