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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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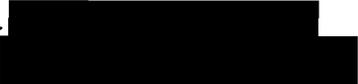
**U.S. Citizenship
and Immigration
Services**



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Date: **MAY 31 2012**

Office: TEXAS SERVICE CENTER

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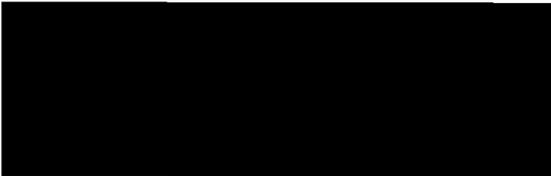
IN RE:

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: 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 catering and food service. It seeks to employ the beneficiary permanently in the United States as a food service supervisor. 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 denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 23, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$24,960 per year). The Form ETA 750 states that the position requires

an associate's degree in business or a related field, two years of experience in the proffered position or two years experience in any related occupation. In section 15 "Other Special Requirements," the Form ETA 750 states that: verifiable references are required; the beneficiary must be available during weekends, holidays and night shifts if necessary; and "two years of college in lieu of experience is allowed."

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1989 and to currently employ 45 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner since June of 2000.

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. The petitioner did submit, however, W-2 Forms which state wages were paid to the beneficiary as follows:

- 2001 - \$13,633.25²

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).

² The petitioner submitted a W-2 Form showing the beneficiary was paid wages of \$8,124 in the

- 2002 - \$5,113
- 2003 - \$4,639
- 2004 - \$8,412.75
- 2005 - \$6,162.75
- 2006 - \$1,237
- 2007 - \$2,104.50
- 2008 - \$3,427.50
- 2009 - \$3,018.27
- 2010 - \$5,404.80³

Since the petitioner paid the beneficiary some wages, but less than the full proffered wage from 2001 through 2007, it will be necessary that the petitioner establish only the ability to pay the difference between the proffered wage and wages actually paid for those years. Those sums are as follows:

- 2001 - \$11,326.75
- 2002 - \$19,847
- 2003 - \$20,321
- 2004 - \$16,547.25
- 2005 - \$18,797.25
- 2006 - \$23,723
- 2007 - \$22,855.50
- 2008 - \$21,532.50
- 2009 - \$21,941.74

year 2000, which was before the priority date. The payment of these wages will be considered generally in a totality of the circumstances analysis of the petitioner's ability to pay the proffered wage.

³ The job offer must be for permanent full-time employment. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). While the petitioner is not required to employ the beneficiary in the job offered until permanent residence is obtained, the petitioner's employment at the beneficiary for nine years on a part-time basis casts doubt on whether the petitioner will employ him on a full-time basis. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on 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).

- 2010 - \$19,555.20

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on July 9, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 was the most recent return available. In response to a Request for Evidence (RFE) that the the AAO issued, the petitioner submitted its 2007, 2008 and 2009 tax returns. The petitioner’s tax returns⁴ demonstrate its net income for 2001 through 2009, as shown in the table below.

- In 2001, the Form 1120S stated net income⁵ of (\$55,089).
- In 2002, the Form 1120S stated net income of \$39,654.
- In 2003, the Form 1120S stated net income of \$2,841.
- In 2004, the Form 1120S stated net income of \$20,682.⁶
- In 2005, the Form 1120S stated net income of (\$72,761).

⁴ The petitioner’s tax returns are filed in the name of [REDACTED]. All tax returns, however, are deemed filed by the same entity as each return is filed under the petitioner’s tax payer identification number, 54-1490145. In a letter dated August 17, 2011, the petitioner’s payroll administrator stated that the petitioner’s 2001 through 2004 tax returns were filed under [REDACTED] was the same company as [REDACTED] trade name [REDACTED]. The payroll administrator explained that “as the catering part of the company grew they deleted the name [REDACTED]. These different names are all under the federal tax id #1490145.”

⁵ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 17, 2007) (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, credits, deductions and/or other adjustments shown on its Schedule K for 2001 through 2006, the petitioner’s net income is found on Schedule K of those tax returns.

⁶ The “income/loss reconciliation” figure on line 17e of the 2004 Schedule K is not fully legible, showing only “20.” The \$20,682 figure cited above was calculated from the entries on the Schedule K.

- In 2006, the Form 1120S stated net income of \$34,894.
- In 2007, the Form 1120S stated net income of (\$219,619).
- In 2008, the Form 1120S stated net income of (\$49,889).
- In 2009, the Form 1120S stated net income of \$35,410.

Therefore, for the years 2002, 2004, 2006 and 2009, the petitioner's income tax returns would state sufficient net income to pay the difference between wages paid to the beneficiary and the full proffered wage. However, the petitioner has filed for additional workers. From the record, it is not clear that the petitioner can pay all of its sponsored workers in any of these years. This will be discussed below. The tax returns do not state sufficient net income to pay the difference between wages paid to the beneficiary and the full proffered wage in 2001, 2003 or 2005, 2007 and 2008.

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.⁷ 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 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 2001 through 2010, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of (\$165,548).
- In 2002, the Form 1120S stated net current assets of (\$159,327).
- In 2003, the Form 1120S stated net current assets of (\$105,341).
- In 2004, the Form 1120S stated net current assets of (\$222,963).
- In 2005, the Form 1120S stated net current assets of (\$304,888).
- In 2006, the Form 1120S stated net current assets of (\$176,151).
- In 2007, the Form 1120S stated net current assets of (\$357,435).
- In 2008, the Form 1120S stated net current assets of (\$114,004).
- In 2009, the Form 1120S stated net current assets of (\$249,883).

Therefore, for the years 2001 through 2009, the petitioner did not have sufficient net current assets to pay the difference between wages paid to the beneficiary and the full proffered wage.⁸

⁷According 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.

⁸As stated above, the petitioner's net income would be sufficient in 2002, 2004, 2006 and 2009 to pay the wage of the instant beneficiary. Whether the net income would be sufficient to pay all sponsored workers is unclear.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

In a July 8, 2011 RFE, the AAO stated that if the petitioner filed multiple petitions for multiple beneficiaries, the petitioner must establish the ability to pay the proffered wage of each beneficiary. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). The petitioner was asked to provide the following information about each individual for whom a Form I-140 had been filed, if any: full name; receipt number and priority date for each petition; whether any petition filed was pending or inactive, and if a petition was inactive the date the petition was withdrawn, denied or the beneficiary had become a lawful permanent resident; the wage paid to each beneficiary from their respective priority date to the present; and Forms W-2 or 1099 from each beneficiary's respective priority date to the present. In response to that request, the petitioner provided the following information that it filed petitions for:

1. [REDACTED] - "Form I-140 was filed, approved, and he is now a U.S. citizen since 2008. He no longer works for [REDACTED]." The petitioner did not specify the priority date, proffered wage or provide any information related to wages paid, or when permanent residence was obtained.
2. R. B. - "Form I-140 is pending with receipt number [REDACTED]" Similarly, counsel did not provide any information related to the priority date, proffered wage or any wages paid to this beneficiary.

The petitioner did not fully comply with the information requested and from the record as it now exists, it cannot be determined that the petitioner has the ability to pay the proffered wage of the present beneficiary plus other sponsored workers based upon the petitioner's net income, net current assets or wages paid to the present beneficiary or any other sponsored worker since neither the proffered wage nor wages paid to other sponsored workers were provided by the petitioner as requested in the AAO's RFE. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Without the information requested, the AAO cannot determine the petitioner's total proffered wage obligation for each year at issue, or determine whether the petitioner can pay the total proffered wages in the years indicated above where the net income would cover one beneficiary.

On appeal, counsel states that "in the last three years" (brief dated August 21, 2008) the petitioner had more than \$12,000,000 in gross receipts, more than \$148,000 in net income, almost \$2,000,000 in assets and more than \$4,000,000 in salary and wage expenses, as well as multiple business accounts that reflect positive business transactions.⁹ In that regard, the counsel submitted, on appeal,

⁹ These figures represent combined three years totals.

copies of bank statements, documentation to show the purchase of real estate for \$3,200,000¹⁰ which, counsel states, shows the financial strength of the petitioner. Counsel states that considering the totality of circumstances, he asserts the petitioner had the continuing ability to pay the proffered wage from the priority date onward. Counsel notes that the petitioner had the option of using lines of credit/bank loans, reducing profit sharing and other means to obtain cash to cover employee expenses and salaries.¹¹

Counsel's assertions¹² regarding the use of credit lines or bank loans to pay the proffered wages of employees will not establish its ability to pay the proffered wage of the present beneficiary. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *John Downes and Jordan Elliot Goodman, Barron's Dictionary of Finance and Investment Terms*, 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that a credit line exists, or existed at the time of the priority date, or that the unused funds from the line of credit were available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a

¹⁰ The real estate lists the borrower as [REDACTED] While it lists one of the petitioner's shareholders as a borrower, assets of a shareholder or a separate corporation cannot be used to establish the petitioner's ability to pay. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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."

¹¹ Counsel asked for an additional 90 to 120 days to provide additional documentation. To date, no additional evidence has been received.

¹² As noted above, counsel asserted that "[t]here are lines of credit . . . to cover all employee expenses and salaries to be considered in making this decision." Counsel submitted no proof that any such lines-of-credit actually existed for consideration. 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)).

detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The petitioner also submitted copies of corporate bank statements in an effort to establish its ability to pay the proffered wage. 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, 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.

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. Comm. 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.

The petitioner has failed to establish, under the facts of this particular case, that it is more likely than not that it had the continuing ability to pay the proffered wage from the priority date onward. The petitioner's tax returns state insufficient net income to pay the proffered wage of the present beneficiary, or the difference between wages paid to the beneficiary and the proffered wage, in 2001, 2003, 2005, 2007 and 2008. The petitioner had negative net current assets from 2001 through 2009. Although requested, the petitioner did not provide sufficient information to determine its total wage obligation to all sponsored workers during all relevant periods. Thus, it cannot be determined that the petitioner had the ability to pay the proffered wage of all sponsored workers during any relevant year. Although the petitioner states on its web site that it received top catering honors from *The Washingtonian Magazine*, Channel 9 News A-List, [REDACTED] "just to name a few," the petitioner did not provide independent proof of that recognition or any honors received. 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 evidence of record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage from the priority date onward. The petitioner provided no information to show that its business was adversely affected by uncharacteristic business expenses or losses during relevant periods which affected its financial status. While the AAO acknowledges the petitioner's growth in gross receipts, the petitioner's failure to respond fully to the AAO's request related to other sponsored workers and its total wage obligation precludes the AAO from finding favorably with respect to the petitioner's totality of the circumstances. 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.

Beyond the decision of the director,¹³ 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. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 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. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

¹³ 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).

In the instant case, and as stated above, the Form ETA 750 states that the position requires an associate's degree in business or a related field, two years of experience in the proffered position or two years of experience in any related occupation. In section 15 "Other Special Requirements," the Form ETA 750 states that: verifiable references are required; the beneficiary must be available during weekends, holidays and night shifts if necessary; and "two years of college in lieu of experience is allowed." The petitioner was notified in the AAO's RFE that experience letters from employers listed on the Form ETA 750 were required to establish that beneficiary's work experience. The AAO noted that the petitioner had submitted letters for two prior employers not listed on Form ETA 750. 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.

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 petitioner did not provide those letters as requested.

The AAO also noted ambiguity on the Form ETA 750 concerning the educational requirements of the position and whether that education could be used in lieu of stated experience requirements.

The AAO asked the petitioner to provide a copy of the documentation prepared in accordance with the prior DOL labor certifications regulations at 20 C.F.R. § 656 (2001), including a signed recruitment report, all online and print recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. The petitioner was asked to also include any other communications with the DOL that may be probative of the petitioner's intent, communication and consideration of "any related field" to allow candidates to qualify for the position based on two years of college in lieu of experience, such as correspondences or documents generated in response to an audit. The petitioner did not provide the requested information. Finally, the Form ETA 750 stated that the beneficiary was required to have two years of college with the field of study being in business or a related field. The petitioner was asked to provide (in the RFE) documentation showing that journalism would be related to business. Counsel merely stated that the beneficiary had a four-year journalism degree, and therefore had two years of college. He failed to address or submit the requested documentation to establish how journalism was a related field to business. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.