

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



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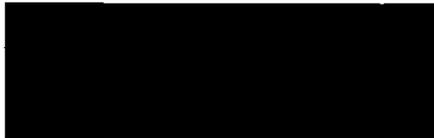
DATE: **OCT 10 2012**

OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

 Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a performing arts center. It seeks to employ the beneficiary permanently in the United States as a Director of Music Programs. 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 August 11, 2009, 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2011. The proffered wage as stated on the Form ETA 750 is \$33,000 per year.

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 nonprofit organization. On the petition, the petitioner claimed to have been established in 1976 and to currently employ one (1) full-time employee and five (5) part-time employees. According to the tax returns in the record, the petitioner's fiscal year begins July 1 and ends the following June 30. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary claimed to have worked for the petitioner full-time beginning June 1997.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner has provided Forms 1099-Misc² that it issued to the beneficiary in the following calendar years:

- \$2,867.25 in 2001;
- \$3,035.00 in 2002;

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 A Form 1099-Misc does not report wages paid to an employee, which are normally reported on Form W-2, thus they are not *prima facie* evidence of an employer's ability to pay the proffered wage. The amounts listed on a Form 1099 are not subject to taxes incident to employment, such as unemployment taxes or social security taxes, therefore, a Form 1099 is not a true reflection of an employer's ability to pay wages, but rather, is a reflection of its ability to procure services from an independent contractor or another company.

- \$1,755.00 in 2003;
- \$2,130.00 in 2006;
- \$2,630.00 in 2007; and
- \$24,221.52 in 2008.

The record does not contain any evidence of payment by the petitioner to the beneficiary for the calendar years 2004 or 2005; the petitioner did not provide W-2 statements or Forms 1099 issued to the beneficiary for those years. The petitioner also did not provide any pay statements that it may have issued to the beneficiary during 2009 or earlier.³

Thus, 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 onward. Even if the AAO were to consider the amounts above in its analysis of the petitioner's ability to pay the proffered wage to the beneficiary, there is a shortfall between the amount paid to the beneficiary and the proffered wage of \$33,000 as follows:

- \$30,132.25 in 2001;
- \$29,965 in 2002;
- \$31,245 in 2003;
- \$30,870 in 2006;
- \$30,370 in 2007;
- \$8,778.48 in 2008.

Therefore, the petitioner has not established that it employed the beneficiary or had the ability to pay the proffered wage to the beneficiary through the amounts paid to the beneficiary or the beneficiary's company.

The AAO notes that the beneficiary claimed full-time employment with the petitioner on the labor certification, which was signed under penalty of perjury. The record of proceeding indicates that the petitioner is issuing pay records to the beneficiary on Form 1099-Misc, which suggests that the beneficiary is not an employee of the petitioner, but rather an independent contractor or service provider. Further, the petitioner has provided the beneficiary's individual tax returns for 2001, 2002, 2003, 2006, 2007, and 2008, each of which indicates that the beneficiary received no wages or salaries, but did receive business income. Thus, the beneficiary appears to be operating a business under the name "Arts in Therapy," which provides "music therapy." A letter, dated June 19, 2009, from the petitioner's Executive Director, states that the beneficiary is being paid for "piano lessons," as a "teacher," and as a "piano instructor." The letter does not indicate the beneficiary is employed as the Director of the petitioner's music programs, as the beneficiary indicated on the labor certification and on the G-325 in the record. Further, another letter in the record, dated July 1, 2009,

³ The director requested the beneficiary's 2009 pay statements in his Request for Evidence (RFE), dated April 14, 2009, and again in a Notice of Intent to Deny (NOID) on June 12, 2009. No pay statements were provided in response to either notice.

from [REDACTED] indicates that petitioner is hiring out the beneficiary as a teacher to that organization, and that both organizations pay associated costs of her services. This suggests that position offered may not be for full-time employment. The job offer must be for a permanent and full-time position. 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). This information contradicts the information provided by the beneficiary on the labor certification, casts doubt on the validity of the evidence in the record, and casts doubts that this is a *bona fide* job offer. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The petitioner must resolve these issues with independent, objective evidence in any further filings. *Id.* at 591-592 (attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice).

Thus, it is unclear that the petitioner will be the beneficiary's employer and was authorized to file the instant petition. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3⁴ states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the petitioner has failed to establish what company would actually employ the beneficiary, as it appears that the petitioner may intend to contract for the beneficiary's services as an independent contractor. The petitioner must resolve these issues with independent, objective evidence in any further filings. *Matter of Ho*, 19 I&N Dec. at 591-592.

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

⁴ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

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 20, 2009, with the receipt by the director of the petitioner's submissions in response to the director's Notice of Intent to Deny (NOID). As of that date, the petitioner's fiscal year 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for fiscal year 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2002 to 2007, as shown in the table below.

- In 2002, the Form 990 stated net income⁵ of \$16,465.
- In 2003, the Form 990 stated net income of -\$5,085.
- In 2004, the Form 990 stated net income of \$9,973.
- In 2005, the Form 990 stated net income of \$3,278.
- In 2006, the Form 990 stated net income of \$20,165.
- In 2007, the Form 990 stated net income of \$14,362.

As noted above, the petitioner's fiscal year runs from July 1 to June 30 of the following year. Thus, the petitioner's 2002 tax return covers the period from July 1, 2001 to June 30, 2002. As such, the petitioner did not provide a tax return relevant to the priority date, April 30, 2001. Based on the information in the record, the petitioner did not demonstrate that it had sufficient net income to pay the proffered wage to the beneficiary during fiscal years 2001, 2002, 2003, 2004, 2005, 2006, 2007, or 2008. Even if the AAO were to consider the amounts paid to the beneficiary's company, the petitioner would not have had sufficient net income to pay the difference between the amounts paid and the proffered wage during fiscal years 2001, 2002, 2003, 2004, 2005, 2006, 2007, or 2008.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner did not have sufficient net income to pay the difference between the wages paid to the beneficiary's company and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ The petitioner did not provide audited financial statements nor annual reports for any of the years in questions, from 2001 to present. Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference.

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

⁵ USCIS considers net income for a nonprofit organization to be the figure shown on line 18 of the petitioner's IRS Form 990, which represents the petitioner's revenue less expenses.

⁶ 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.

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

In the instant case, the petitioner claims to have been in operation since 1976,⁷ and that it currently employs one (1) full-time employee and five (5) part-time employees. The petitioner does not report wages or salaries paid on its tax returns, although it does report management and administration expenses. The information provided by the petitioner does not reflect significant or historically increasing sales. The petitioner has not established the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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

⁷ According to the Pennsylvania Department of State, the petitioner was created on March 22, 1979. *See* <https://www.corporations.state.pa.us/corp/soskb/Corp.asp?458502> (last accessed September 8, 2012).

C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two (2) years of experience in the job offered, Director of Music Programs, or two (2) years of experience in a related occupation, Music Teacher. On the labor certification, the beneficiary claims several employment experiences to document her qualification for the offered position. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A)

The beneficiary states that she was employed as a "Piano and Theory Instructor" with the [REDACTED] from September 1994 to July 1995. The beneficiary indicated part-time employment at 12 hours per week. The record contains a letter, dated February 11, 1997, from a Senior Tutor, which states that the beneficiary taught music theory and piano from September 1994 to June 1995. The writer of the letter includes [REDACTED] in her signature block, however, the letter is written on letterhead for the "Edna Manley College of the Visual and Performing Arts." No explanation is provided as to whether these are the same entity, or different entities. The letter does not indicate whether her employment was full-time or part-time. Further, the writer of the letter does not appear to be the beneficiary's prior employer, but rather an employee of Edna Manley College, which appears to be a different entity. As the letter does not meet the requirements set out at 8 C.F.R. § 204.5(l)(3)(ii)(A), including that the letter be from the employer, and provide a description of the beneficiary's experience, this letter cannot be considered to be evidence of the beneficiary's experience.

The beneficiary also states that she was employed as a Music Teacher with [REDACTED] from January 1994 to July 1995 at 35 hours per week. The record contains a letter, dated February 6, 1997, from the principal of [REDACTED] stating that the beneficiary "taught in the Music Department" and was employed from January 1994 to July 1995. The letter does not indicate if her employment was full-time, or the number of hours employed if less than full-time. The letter indicates the beneficiary resigned to accept another position in Jamaica. However, another letter in the record, dated October 6, 1995, from the same principal, states that the beneficiary was employed from January 1994 to August 1995, that she was the "head of the Music Department," and that she "developed medical problems which necessitated her giving up her post." The inconsistencies in these letters, as to the beneficiary's dates of employment and position, cast doubt on the veracity of the experience letters provided. The petitioner must resolve these inconsistencies with independent, objective evidence in any further filings. See *Matter of Ho*, 19 I&N at 591-92.

The beneficiary also states that she was employed as a Music Instructor for [REDACTED] Primary School from

October 1993 to June 1994 at five (5) hours per week. The beneficiary states that her experience was limited and that she “[c]onducted several choirs ... for occasional performances and graduation.” There is no letter from this employer in the record. The petitioner has not provided the regulatory required evidence of this experience, therefore, the AAO will not consider it in its evaluation of the beneficiary’s qualifications.⁸

The beneficiary also states that she was employed as a Director/Music Instructor for [REDACTED] from September 1989 to January 1994. The beneficiary indicates that this was her “own music studio” and that her employment experience included 25 hours per week. The petitioner has not provided the regulatory required evidence of this experience, therefore, the AAO will not consider it in its evaluation of the beneficiary’s qualifications. The beneficiary also lists other sets of experience which will not be considered herein, as the petitioner has not documented how they are related to the offered position, Director of Music Programs, or the related occupation, Music Teacher, and has not provided the regulatory required evidence for the claimed experience.⁹

Further, the AAO notes that much of the beneficiary’s claimed experience overlaps with the time that she claims to have been pursuing studies, such as her studies at [REDACTED] from September 1985 to June 1998, and at [REDACTED] Business College from September 1987 to December 1988. Further, her work experiences at [REDACTED] High School, [REDACTED], and [REDACTED] Primary School, if properly documented, would also overlap. This must be addressed by the petitioner in any further filings.

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.

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.

⁸ The petitioner provided a letter, dated February 2, 1997, which appears to be a personal reference letter from a “Lecturer.” This letter does not come within the meaning of an employer letter as set out in 8 C.F.R. § 204.5(l)(3)(ii)(A), therefore, the AAO will not consider it without documentation establishing the unavailability of the regulatory required evidence.

⁹ The beneficiary listed experience as a part-time “keyboard player,” which does not appear to be experience in the offered position or the alternate occupation, therefore it will not be considered. The beneficiary also listed experience as a “choir director,” and marked out the number of hours per week, stating that she was a “seasonal volunteer” on Christmas and Easter productions; as no hours per week are indicated, and the experience does not appear to be regular or quantifiable, the AAO will not consider this experience. The beneficiary also listed experience as a part-time “Music Therapy Intern,” which does not appear to be experience in the offered position or the alternate occupation, therefore it will not be considered.

Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The 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.