

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: **SEP 06 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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.

It must be noted that it came to the attention of the AAO, prior to our reviewing the merits of the instant appeal, that the petitioner's business was suspended on February 1, 2011. On June 1, 2012, this office issued a Notice of Intent to Dismiss, notifying the petitioner of the derogatory information pertaining to its business operations and affording the petitioner 30 days to provide evidence demonstrating that its business is in good standing. On June 29, 2012, this office received the petitioner's response which contained evidence demonstrating that the petitioner's status had been suspended by the California Franchise Tax Board. The response also contained an Application for Certificate of Revivor which the petitioner filed with the State of California Franchise Tax Board. According to the website of the California Secretary of State (accessed August 1, 2012), the petitioner is currently in good standing with the State of California.

Therefore, as set forth in the director's April 4, 2009 denial, the single 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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on June 26, 2007. The proffered wage as stated on the ETA Form 9089 is \$17.00 per hour (\$35,360 per year). The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

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

On appeal, counsel submits a brief; a copy of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2007; a copy of the director's February 4, 2009 request for evidence (RFE); a copy of the petitioner's response to the director's RFE, including the documents submitted with the response: an unaudited Statement of Assets, Liabilities and Capital for 2008; an unaudited Statement of Assets, Liabilities and Capital for 2007; a letter dated March 16, 2009 from [REDACTED] [REDACTED] copies of IRS Form W-2 which the petitioner issued to the beneficiary in 2007 and 2008; copies of earnings statements issued by the [REDACTED] to the beneficiary in January and February 2009; copies of bank statements for the [REDACTED] for June through December 2007; a copy of the petitioner's credit card statement for June through December 2007; a copy of the beneficiary's Employment Authorization Card; and a copy of a USCIS Interoffice Memorandum dated May 4, 2004 from Associate Director for Operations [REDACTED] [REDACTED] entitled "Determination of Ability to Pay under 8 CFR 204.5(g)(2)."

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2002, to have a gross annual income of \$658,000, and currently to employ 14 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the ETA Form 9089, signed by the beneficiary on July 17, 2007, the beneficiary did not claim to have worked for the petitioner.

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).

On appeal, counsel asserts that the director erred in determining that the petitioner had not and was not paying the beneficiary the proffered wage; that the director erred in failing to prorate the proffered wage for the year in which the priority date was established; that the director erred in failing to consider the bank statements provided as evidence; that the director erred in failing to consider officer compensation as available to pay the proffered wage; and that the director erred in failing to consider the totality of the petitioner's financial circumstances.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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. In the instant case, the petitioner provided copies of IRS Form W-2 which it issued to the beneficiary in 2007 and 2008 as well as hand-written pay statements issued to the beneficiary in January and February 2009. Therefore, the beneficiary's IRS Forms W-2 and pay statements show compensation received from the petitioner, as shown in the table below.

- In 2007, the Form W-2 stated compensation of \$3,000.00.
- In 2008, the Form W-2 stated compensation of \$36,000.00
- In 2009, the pay statements stated compensation of \$4,500.00.

Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage in 2007 or 2009. The petitioner has demonstrated, however, that it paid the beneficiary the full proffered wage in 2008. Therefore, while the petitioner has demonstrated the ability to pay the beneficiary in 2008, it must still demonstrate the ability to pay the beneficiary the difference between the wages paid to the beneficiary and the full proffered wage for 2007 and 2009, that difference being \$32,360 and \$30,860 respectively.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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).

With its initial petition submission, as evidence of its ability to pay, the petitioner provided its U.S. Corporation Income Tax Return (Form 1120) for 2005 only. On February 4, 2009, the director

issued a request for evidence (RFE), asking the petitioner to supply evidence of its ability to pay for 2007 and 2008 in the form of audited financial statements, annual reports or federal income tax returns. In its response, the petitioner provided unaudited financial statements for 2007 and 2008 and a letter from its certified public accountant. The letter dated March 16, 2009 from [REDACTED] (no author specified) states:

Bookkeeping service to [REDACTED] is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

In his decision, the director found that the petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the director did not consider the figures reported on the unaudited financial statements.

The letter from [REDACTED] goes on to state that audited financial reports would be available within eight weeks of the date of the letter. The author did not state, however, that the petitioner's federal income tax returns were not yet available.

On appeal, counsel submits the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2007 but no audited financial statements. Though counsel claims that he asserted in his response to the director's RFE that the petitioner's federal income tax returns were not yet available at the time the response was submitted, this statement does not appear anywhere in the petitioner's response. However, the 2007 federal income tax returns submitted on appeal are dated March 15, 2009. The AAO will accept that the petitioner was referring to the tax returns in its RFE and will consider these documents in our determination of the petitioner's ability to pay.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on May 6, 2009 with the receipt by the director of the petitioner's appeal with the accompanying financial evidence. As of that date, the petitioner's 2008 federal income tax return was not yet prepared. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2007, as shown in the table below.

- In 2007, the Form 1120 stated a net loss of \$15,032.00.

Therefore, for the years 2007, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 2007, as shown in the table below.

- In 2007, the Form 1120 stated net current liabilities of \$93,477.00.

Therefore, for the year 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in determining that the petitioner had not and was not paying the beneficiary the proffered wage. Counsel asserts that the beneficiary was paid \$3,000 in 2007 and that those wages were paid to the beneficiary solely for the month of December, thereby demonstrating that the petitioner was paying the beneficiary at a rate exceeding the proffered wage.

The regulation 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 regulations require the petitioner to demonstrate the ability to pay from the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. In this case, the

²According 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.

priority date was established in June 2007, not in December. On its own, that the petitioner paid the beneficiary \$3,000 for 2007 does not satisfy the burden of proof in this instance. The petitioner would either have to demonstrate that it had the ability to pay the beneficiary the difference between the wages paid (\$3,000) and the full proffered wage (\$35,360) for 2007, that difference being \$32,360, out of its net income or net current assets, or demonstrate that it paid the beneficiary at least the rate of the proffered wage for each month from the establishment of the priority date through the end of the year. In this case, the petitioner has demonstrated neither.

Corresponding with his first assertion, counsel asserts that the director erred in failing to prorate the proffered wage for the year in which the priority date was established since the priority date is in June. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence for the period of time in question.

On appeal, counsel asserts that that the director erred in failing to consider the bank statements for 2007 provided as evidence. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L which was considered above in determining the petitioner's net current assets.

On appeal, counsel also asserts that the director erred in failing to consider officer compensation as available to pay the proffered wage.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that the petitioning entity is owned by three individuals: [REDACTED] holds 55.55 percent of the company's stock and devotes 100 percent of his time to the business. [REDACTED] holds 38.89 percent of the company's stock but devotes only 10 percent of his time to the business. [REDACTED] holds 5.56

percent of the company stock and devotes 100 percent of his time to the business. According to the petitioner's 2007 IRS Form 1120 Schedule E (Compensation of Officers), the shareholders elected to pay [REDACTED] \$19,200 and [REDACTED] \$44,400. [REDACTED] however, received no compensation. These figures are not, however, supported by IRS Forms W-2 Forms for either individual for the year represented. Further, neither [REDACTED] nor [REDACTED] supplied personal income tax returns to substantiate his personal income. It should also be noted that in 2005, [REDACTED] received 38,400 in officer compensation and [REDACTED] received \$32,400. We note here that the compensation received by the company's owners during these two years was not a fixed salary but was modest.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 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."

In the present case, however, counsel is not suggesting that USCIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their corporation. However, the petitioner provided tax documentation for only two years: 2005 and 2007. Each of the two shareholders who receive officer compensation received only a modest salary, [REDACTED] receiving \$32,400 in 2005 and \$44,400 in 2007 while [REDACTED] received \$38,400 in 2005 and \$19,200 in 2007. The petitioner provided no documentary evidence demonstrating that either shareholder is either willing or able to forgo any portion of his officer compensation in order to pay the beneficiary the difference between the wages paid and the full proffered wage. In 2007, the petitioner owed the beneficiary \$32,360 which amounts to more than 50 percent of the total officer compensation paid by the petitioner which is considerable, particularly given the modest nature of the officer compensation. Since each of the two shareholders which receives an income devotes 100 percent of his time to the operation of the business, according to the Internal Revenue Code the compensation paid would constitute a salary.³ The petitioner has provided no documentary evidence, such as the shareholders' personal income tax returns and itemized lists of their household expenses, demonstrating that each individual would be able to survive on 50 percent on the compensation paid in 2007. Therefore, the AAO does not concur that the petitioner had sufficient officer compensation to pay the beneficiary and compensate the two officers who received such income.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

³ See <http://www.irs.gov/businesses/small/article/0,,id=101038,00.html#6> (accessed August 3, 2012).

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 provided financial documentation for only two years of business operations. In neither year did the petitioner demonstrate profitability. The petition's income during each of the two years was consistent, as was officer compensation and payroll, though each of the latter two expense categories was modest. The petitioner has not established the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8

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

In the instant case, the labor certification states that the offered position requires 24 months of experience in the job offered: head cook, performing the following duties:

Direct preparation and seasoning of traditional Chinese dishes including soups, meats and vegetables; assign job duties to other cooks and assistants and supervise food preparation; demonstrate cooking techniques and train other cooks; confer with manager to order supplies and plan menu items.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a head cook for [REDACTED] in Seoul, Korea from June 1, 2001 until June 30, 2006. ETA Form 9089 contains no other experience for the beneficiary.

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).

In support of the beneficiary's experience, the petitioner provided one letter which is entitled "Career Certificate," and is dated December 5, 2006. The letter does not appear to have been drafted on company letterhead and does not bear the name or address of the employer on the actual letterhead. The address does, however, appear in the body of the attestation. The letter was written by [REDACTED] who claims to be a representative of [REDACTED] though this individual does not identify his position with the company. Further, the letter does not identify any of the duties which the beneficiary was responsible for performing with the employer and does not indicate whether the beneficiary worked on a full-time or part-time basis. Moreover, the employment letter is written in Korean and is accompanied by an English translation. However, the petitioner did not provide a certification by the individual who translated the document, indicating that the translator is competent to translate from the foreign language into English and that the translation is complete and accurate as required by 8 C.F.R. § 103.2(b)(3). The letter does not even identify the name of the translator.

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.

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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.