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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 0 6 2012 OFFICE: NEBRASKA 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an agriculture business. It seeks to employ the beneficiary permanently in the United States as a ranch foreman. 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 April 23, 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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is $14.51 per hour ($30,180.80 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year is the same as a calendar year. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner.

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 Sonegawa*, 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The petitioner asserts that it paid the beneficiary $6,997.00 in 2001; $9,732.00 in 2003; $8,708.00 in 2004; $2,410.00 in 2006; and $3,359.00 in 2007. The director in his request for evidence (RFE) of February 11, 2009, requested copies of any Forms W-2 issued by the petitioner to the beneficiary, but none were provided. The petitioner provided a Form 1099 from 2007 for $3,359.00, but none for any other years. The petitioner also provided copies of two checks paid to the beneficiary in 2009 totaling $2,177.20. Thus, for 2007 and 2009 the petitioner would need only demonstrate the ability to pay the difference between the wages paid and the proffered wage, which is $26,785.35 in

[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).

2007 and $28,003.60 in 2009. The only other evidence of the payment of the above claimed wages are unaudited profit and loss statements with a "Register Report" listing amounts paid to the beneficiary; however, the AAO notes that counsel'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.

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).

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 March 25, 2009, with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2008 federal income tax return was not yetavailable. Therefore, the petitioner's income tax return for 2007 is the most recent return available.[2] The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006, and 2007 as shown in the table below.

- In 2001, the Form 1120 stated net income of $35.00.
- In 2002, the Form 1120 stated net income of $60.00.
- In 2003, the Form 1120 stated net income of $0.00.
- In 2004, the Form 1120 stated net income of $36.00.
- In 2005, the Form 1120 stated net income of -$11,082.00.
- In 2006, the Form 1120 stated net income of -$4,600.00.
- In 2007, the Form 1120 stated net income of -$3,690.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 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

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[2] The director did not consider the tax information relating to [redacted] For the years 2001 through 2005, the petitioner, [redacted] was a 100% owned subsidiary of [redacted] and filed a consolidated tax return which included the separate reporting of both entities' income and expenses. Therefore, the figures from the consolidated tax return were considered by the AAO in 2001, 2002, 2003, 2004, and 2005. In 2006 and 2007, [redacted] filed a tax return independent of any other entity and reported that it was owned 100% by [redacted] Therefore, the tax return of the petitioner independent of any other entity was considered in 2006 and 2007.

difference between the petitioner's current assets and current liabilities.[3] 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 2001, 2002, 2003, 2004, and 2005 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of $88,077.00.
- In 2002, the Form 1120 stated net current assets of $70,204.00.
- In 2003, the Form 1120 stated net current assets of $905.00.
- In 2004, the Form 1120 stated net current assets of $462,921.00.
- In 2005, the Form 1120 stated net current assets of $366,807.00.

The petitioner's tax returns submitted for 2006 and 2007 did not include a completed Schedule L listing current assets and current liabilities. Therefore, for the years 2003, 2006, and 2007, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage. The petitioner did have sufficient net current assets to pay the proffered wage in 2001, 2002, 2004, and 2005.

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

On appeal, counsel asserts that the parent corporation, has the ability to pay the proffered wage and that it continued to be the owner of the petitioner until September 17, 2008. In support of this claim, counsel submits a copy of the minutes of a corporate meeting on September 17, 2008, and a California Secretary of State statement of information form. The AAO notes that the petitioner's 2006 and 2007 Forms 1120 state that the corporation was 100% owned by In addition, the letter from CPA dated July 19, 2007, states that was a subsidiary of only until January 1, 2006. Thus, the petitioner has submitted inconsistent information regarding the ownership of the business in 2006 and 2007. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, as the petitioner has failed to sufficiently resolve the conflicting evidence in the instant case, the financial information reported on

[3] 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 tax returns of I will be considered only in the years 2001 through 2005.

The letter from CPA dated July 19, 2007, also states that will continue to cover any shortfalls in expenses including the wages of the beneficiary. However, the AAO notes that the evidence does not demonstrate that or any other entity other than the petitioner is obligated to provide funds to pay the salary of the beneficiary.

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."

Counsel also cites *United States v. Weissman*, 219 F.2d 837 (2d Cir. 1955) and asserts that the assets and income of should be considered in determining the petitioner's ability to pay the proffered wage since they have legal liability for the corporation.

The AAO notes that counsel does not state how *United States v. Weissman,* which was decided in the United States Court of Appeals for the Second Circuit is binding in this matter. The petitioner's business is not located within the jurisdiction of the Second Circuit. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals within the circuit where the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). In addition, the relevance of the case to the instant matter is not clear as *United States v. Weissman* involved a criminal conviction and held that there could be legal transactions between corporations owned by the same party.

Counsel also cites an unpublished decision it refers to as AAU and asserts that the "assets and other capitol [sic] resources of the petitioner" and the flexibility it allowed them to set salaries and allocate resources should be considered. In addition, counsel cites several other unpublished decisions supporting the assertion that USCIS must consider the normal accounting practices of a company and other factors. However, counsel does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS, formerly the Service or INS, are binding on all USCIS employees in the administration of the Immigration and Nationality Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also asserts that [redacted] has a credit line of $100,000.00 and received a divorce settlement of $249,989.97 as well as another settlement of $225,000.00 which should be considered. 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 the unused funds from the line of credit are 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 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).

Moreover, the line of credit from Bank of America to which counsel refers as well as the settlement income does not belong to the business, but to [redacted] personally. The AAO notes that USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, 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.

Counsel also points to the amounts it claims to have paid the beneficiary and asserts that payments made to the beneficiary tend to confirm the petitioner's ability to pay the proffered wage. However, as previously stated, the evidence of payments made to the beneficiary in 2001 through 2006 is not persuasive as it comes from unaudited financial statements which are the representations of management. The Form 1099 from 2007 serves as adequate evidence of the amount paid in that year, but it is well below the proffered wage.

Counsel also states that the petitioner is involved in a long term project which will convert its main crop from walnuts to pomegranates and that this change in activity is affecting the profitability of the business. The AAO notes that a change in the business activity does not relieve the petitioner of the burden of demonstrating the ability to pay the proffered wage, but it may be considered in a totality of circumstances analysis below.

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

Counsel also asserts that USCIS may rely on bank account records as well as an employer's current or previous payment of the wage to the beneficiary to determine a company's ability to pay and cites language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum). *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). Counsel has submitted several personal bank statements of [redacted] and two corporate bank statements as well as evidence of two payments for $1,088.60 made by check in 2009 to the beneficiary totaling $2,177.20 over the course of two months.

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage *beginning on the priority date*. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 27, 2001.

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 Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee 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 demonstrated sufficient net current assets in 2001, 2002, 2004, and 2005 to pay the proffered wage. The petitioner failed to demonstrate sufficient net income or net current assets in 2003, 2006, and 2007. The petitioner also failed to include a copy of the Schedule L for 2006 and 2007 which would reflect net current assets for those years. The petitioner's gross receipts during the relevant years varied, with no gross income reported in 2006 and 2007. The petitioner indicated on the Form I-140 that it employs one person. Salaries and wages were not substantial in any year from 2001 through 2007, and the tax returns reflected no wages paid at all during 2005 and 2006. While the petitioner has been in business twelve years, it does not pay substantial compensation to its owner, and all the officer compensation reflected on the consolidated tax returns came from the prior owner's medical practice. The petitioner did not submit evidence sufficient to demonstrate that the prior owner was willing and able to forego officer compensation in order to pay the beneficiary the proffered wage in 2003 when net current assets were not sufficient to pay the proffered wage.

In addition, there is no evidence in the record of the historical growth of the petitioner's business. Counsel asserts that the petitioner is changing its primary activity from walnut production to pomegranate production, and that this change has affected the profitability of the business. Counsel

also asserts that the change will result in increased profits in the future. In support of this assertion, the petitioner submitted a letter from CPA dated October 15, 2009, which states that the petitioner estimates product sales of $120,000 annually once full production is reached. In addition, the petitioner plans to rent out part of the property for weddings which will bring in additional income and use a $225,000 settlement amount to cover shortfalls in income. However, the AAO notes that this statement is not supported by probative evidence or independent market data in the record and therefore does not sufficiently demonstrate that the petitioner will have the ability to pay the beneficiary the proffered wage. Furthermore, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if eligibility is not established at the priority date with the expectation of eligibility at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The instant case is further distinguished from *Sonegawa* in that the evidence does not support the claim that there will be a resumption of successful business operations. In the instant case, the petitioner has suffered a loss in each year reported and was able to demonstrate the ability to pay the proffered wage in 2001, 2002, 2004, and 2005 only due to the additional income and assets of another entity on the consolidated tax return. That entity is no longer the owner of the petitioner. Further, the evidence does not demonstrate the petitioner's outstanding reputation in its industry as was demonstrated in *Sonegawa.* 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. 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).

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)(l), (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 years of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position of ranch foreman based on experience as a landscaper with [redacted] working 40 hours per week from March 1991 to October 1991, and as an irrigation worker for [redacted] working 40 hours per week from February 1991 to July 1991. No other employment experience is listed on the labor certification.

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 record contains a letter dated March 9, 2009, from [redacted] on [redacted] letterhead which states that the beneficiary was employed by [redacted] located at [redacted] as a loft manager from 1995 to 2001 in which his duties included construction of pigeon lofts, as well as training, feeding, and maintaining the lofts. The letter also states that the beneficiary became skilled at tractor repair, fence work, irrigation repair, and general ranch maintenance. The AAO notes that the letter does not contain [redacted] title, the letter fails to provide specific dates of employment, and it does not state whether the work was full-time.

The record also contains a letter dated April 25, 2001, from [redacted] letterhead stating that the beneficiary has worked 20 hours per week for the association since 1995 maintaining the property, lake, and roads, including irrigation installation and repair, road repair, weed control, mowing, tree pruning, spraying, and equipment maintenance and repair. The AAO notes that this letter does not contain [redacted] title, and it fails to provide specific dates of employment.

The AAO further notes that neither [redacted] are listed as prior employers on the Form ETA 750. The beneficiary set forth his credentials on the labor certification and signed his name on April 27, 2001, under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part B, question 15 where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," the beneficiary did not list the claimed work experience with [redacted]

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.

No letters of experience from the employers listed on the Form ETA 750 were provided. In addition, the AAO notes that the dates of employment with overlap for five months from March 1991 to July 1991, indicating that the beneficiary worked 40 hours per week for both landscaping companies at the same time. The evidence does not address how the beneficiary could have worked 40 hours per week for both companies, which presumably perform most of their landscaping activities during daylight hours. Working 80 hours per week would have required that work be done at night as well as during the day. Further, the total time covered by the beneficiary's claimed work experience on the labor certification is only eight months, whereas the labor certification requires a minimum of two years of experience in the job offered.

As previously noted, *Matter of Ho* states: "It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies." *Supra.* at 591-92.

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.