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

(b)(6)

[redacted]

Date: SEP 10 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese cuisine chef. 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 and 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 1, 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 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 March 25, 2005. The proffered wage as stated on the Form ETA 750 is $51,064 per year. The Form ETA 750 states that the position requires four 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]

On January 30, 2009, the director issued a request for evidence, noting that as evidence of the ability to pay the beneficiary the proffered wage, the petitioner had only submitted its U.S. Individual Income Tax Return (Form 1040) for 2006. In his request, the director noted that the petitioner is structured as a sole proprietorship and that, consequently, he would have to provide evidence demonstrating not only that he has the ability to support his own household but also that he has the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. To that end, the director requested complete copies of the petitioner's federal income tax returns (Form 1040) for 2005, 2007 and 2008; a detailed list of household expenses for 2005, 2006, 2007 and 2008 including, but not limited to, mortgage payments, loan payments, credit card payments, vehicle payments, tax payments, utility costs, food costs, entertainment costs, education costs, medical costs, insurance costs, and all other household costs; as well as evidence of any wages paid to the beneficiary, in the form of IRS Forms W-2 or 1099, for the years 2005, 2006, 2007 and 2008.

The petitioner submitted its response on March 13, 2009 but provided none of the financial evidence which the director requested. Rather, in his response, counsel for the petitioner stated that the beneficiary was no longer employed by the petitioner but that he had begun working for a new employer, the [redacted], as permitted by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Because, the beneficiary had begun working for a new employer, counsel asserted that the petitioner in this matter is not obligated to demonstrate the ability to pay the beneficiary since the beneficiary "validly ported" to the new employer.

On appeal, counsel for the petitioner now states:

> The beneficiary…is no longer employed by the petitioner and has ported his adjustment of status application under Section 106(c) of the Twenty-First Century Act of 2000 ("AC21"). His current employer, [redacted] at the [redacted] in San Francisco, California does not have a successor-in-interest relationship with the petitioning employer. The ability to pay of the beneficiary's prior employer should

[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). In the instant circumstance, the AAO will only consider the documents submitted on appeal which were not specifically requested by the director. As explained in this portion of the decision, the AAO will not consider the documents which the petitioner failed to submit in response to the director's request and which are newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> not be determinative of the approvability of the I-140 petition. However, even if the Service were to consider a former employer's ability to pay, the petitioner in this instance possesses sufficient income and assets to pay the proffered wage.

On appeal, counsel submits a brief; the petitioner's Form 1040 for 2005, 2006 and 2007; W-2 statements issued by the City and County of for 2005, 2006 and 2007; a list of the sole proprietor's household expenses for 2005, 2006, 2007 and 2008; statements from Mainstay Investments for 2008; a statement from San Francisco Federal Credit Union for a money market account for January 2007; a statement from Washington Mutual Bank for a certificate of deposit for the period from January through June 2008; copies of checks and statements for settlement payments; and copies of various life insurance statements.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1987 but does not identify its current number of employees. On the Form ETA 750B, signed by the beneficiary on March 21, 2005, the beneficiary does 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 does not claim to have employed the beneficiary. Further, the petitioner provided no evidence of having paid the beneficiary any wages at any time. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2005 onwards.

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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of three. The proprietor's tax returns that are properly in the record of proceeding reflect the following information for the following years:

- In 2006, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of $73,086.00.[2]

[2] The petitioner submitted copies of his IRS Form 1040 for 2005 and 2007. However, these documents were submitted for the first time on appeal though they had been requested by the director in his January 30, 2009 request for evidence. They will, therefore, not be considered here.

Though the petitioner's adjusted gross income for 2006 is sufficient to pay the beneficiary the proffered wage, the petitioner has not demonstrated that the adjusted gross income is sufficient to pay the beneficiary and support the petitioner's household.[3] Additionally, the petitioner has not demonstrated sufficient adjusted gross income to be able to pay the beneficiary and support his household for 2005, 2007 or 2008.

Counsel asserts on appeal that the petition is still "approvable" due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. AC21 allows an *application for adjustment of status*[4] to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an

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See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

[3] Such a determination would require the submission of the petitioner's recurring, personal, household expenses. The director requested such evidence in his January 30, 2009 request for evidence. The petitioner did not supply the requested evidence in its March 13, 2009 response but only provided the evidence for the first time on appeal. It will, therefore, not be considered here. *See Id.*

[4] The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

Thus, in the instant circumstance, the petitioner must still establish eligibility for the benefit sought to include a demonstration that it has the ability to pay the beneficiary the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

On appeal, counsel further asserts, "even if the Service were to consider a former employer's ability to pay, the petitioner in this instance possesses sufficient income and assets to pay the proffered wage." In support of his assertion, counsel goes on to address the petitioner's adjusted gross income for 2005, 2006 and 2007, taking into consideration the petitioner's household expenses. As has been addressed above, the evidence supplied on appeal, in demonstration of the petitioner's adjusted gross income and personal, household expenses, was requested by the director in his January 30, 2009 request for evidence. In its March 13, 2009 response to the director's request, the petitioner did not provide the requested documentation but has only now provided it for the first time on appeal. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).[5]

On appeal, counsel provided evidence of the petitioner's personal assets. However, it should be noted that many of the documents provided relate either to the petitioner and his wife (e.g. settlement checks and brokerage account statements) or to the petitioner's wife alone (e.g. the wife's Certificate of Deposit, money market account, and life insurance policies). The petitioner has provided no statement from his wife, indicating that she is willing to utilize her personal assets for purposes of paying or demonstrating the ability to pay the beneficiary in the instant matter.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel makes reference to settlement checks which were paid to the sole proprietor and his wife. Counsel asserts that the petitioner received $32,200 in 2004 "for money spent on household repairs." In support of his assertion, counsel provides copies of two checks which were issued to the sole proprietor and his wife: 1) in the amount of $10,000 paid on September 22, 2004 and 2) in the

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[5] On appeal, counsel also submitted W-2 statements issued by the City & County of [redacted] to the sole proprietor's wife in 2005, 2006 and 2007. However, the amounts reflected on the W-2 statements are already included on the petitioner's Form 1040 (joint return) for the same years. These statements do not reflect additional income available to the petitioner. For the reasons articulated, this evidence will not be considered. *See Id.*

amount of $22,200 paid on November 3, 2004. The copies of the checks are accompanied by two email messages which reflect communication between the petitioner and the attorney who issued the checks. In the communication, the petitioner discussed the settlement which is being paid for repairs which are required for a property at

Counsel asserts, "this amount (the $32,200) may reasonably be added to his (the petitioner's) 2005 income as the money continued to offset expenses into the year 2005." However, according to both counsel and the petitioner, these funds were being paid for purposes of completing necessary repairs to a home. If the repairs were required, which the emails indicate, then the funds would not have been available to pay the beneficiary. Further, the petitioner did not provide the settlement document which would articulate the terms of the settlement and the purpose for payment. Therefore, the copies of the checks alone, do not demonstrate that the funds were available to the petitioner for purposes of paying the beneficiary.

Counsel next makes reference to $12,570.75 which was paid to the petitioner "in an insurance settlement for medical fees." In support of his claim, counsel provided only a copy of the check, dated April 20, 2007. Again, without a copy of the settlement agreement, the petitioner has not demonstrated that these funds were available for purposes of paying the beneficiary. Further, if these funds were paid as a medical settlement, it is reasonable to conclude that the petitioner incurred a medical expense which required payment. Such funds would likely have been designated for such payment.

Further, with respect to both settlements, any funds received would constitute taxable income and would have been reported on the sole proprietor's U.S. Individual Income Tax Return for the year in which the settlement was received. USCIS has already considered the adjusted gross income as derived from these returns.

On appeal, counsel provides a single year's statement from a brokerage account in the name of the sole proprietor and his wife; a bi-annual statement from a Certificate of Deposit (CD) held by the sole proprietor's wife and one partial monthly statement from a money market account held in the name of the sole proprietor's wife. The single year statement from the brokerage account reflects a balance of $22,288.05 as of the end of the year 2008, the market value of the account having decreased by $10,000 over the course of the year.[6] The bi-annual statement for the CD reflects a

[6] The brokerage account statement for MainStay Investments accounts for three funds, each of which bears its own account number. The total identified above, reflects the market value for the sum of all three accounts. The petitioner provided a second statement, dated February 17, 2009 which identifies an ending balance of $10,250.83. However, this balance is for one (Fund number 42) of the three accounts included in the overall market value identified above. On the annual statement for 2008, this individual fund had a value of $10,041.32. Thus, the market value for this individual fund increased by $209.51 during the period from December 31, 2008 to February 17, 2009. The February 17, 2009 statement does not identify market values for the other two funds which are included in the brokerage account.

balance of $2,481.16 as of June 30, 2008.[7] The partial monthly money market statement is dated January 31, 2007 and shows an ending balance, as of that date, of $2,764.35.[8] As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage.

The petitioner has provided no documentary evidence of funds held in any of the identified accounts from 2005 or 2006. The date of the earliest statement provided on appeal is January 31, 2007 which is the only document from 2007. The single monthly statement shows a balance of $2,764.35 in a

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[7] According to the account statement, the CD was due to mature on September 16, 2008 at an interest rate of 2.96%. Therefore, the mature value of the account would be slightly higher than $2,481.16.

[8] The petitioner provided a second partial statement from the San Francisco Federal Credit Union. However, the second statement reflects a loan / line of credit and not a savings or money market account.

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).

money market account. The petitioner provided no statements from this account for 2008 and, consequently, has not established an average balance for either year. The brokerage account and CD both show balances for 2008. However, the combined value of the two accounts is $24,769.21. The petitioner provided no statements for either of these accounts for 2009 which might have demonstrated sustained funds. Further, the sole proprietor has given no indication regarding when and if he or his wife would have cashed in the CD and whether upon cashing in he or she would have sustained a penalty for the early withdrawal of the funds. Thus, if the AAO were to consider the total amount from both of these funds as available to pay even a portion of the proffered wage, the petitioner has not demonstrated that there existed funds in these accounts in subsequent years to continue paying the beneficiary.

The average balances for all of the accounts identified and as reflected by the statements provided as evidence are not sufficient to cover the full proffered wage for any of the years from the priority date onward. Thus, the sole proprietor's cash assets as reflected in the money market, CD, and brokerage accounts do not establish the petitioner's continuing ability to pay the proffered wage.

On appeal, counsel supplied copies of two life insurance policies held by the petitioner and two life insurance policies held by the petitioner's wife. According to the statement from Pacific Guardian Life dated January 10, 2007, the petitioner has a policy which included a surrender value of $14,337.99 at the end of 2007. The petitioner's policy with New York Life, according to the statement dated December 31, 2008, includes a surrender value of $2,718.73 as of the date upon which the statement was prepared. The petitioner supplied a consolidated account summary statement for two policies which are held by his wife through New York Life. According to the consolidated account summary, the net cash value of the wife's two policies is $60,539.94 as of December 31, 2008. However, this summary does not identify a surrender value or indicate whether the wife's policies even include a surrender value. The petitioner submitted a copy of an account statement representing a life insurance policy held by the petitioner's wife through Transamerica Occidental Life Insurance Company. According to the statement dated April 4, 2008, the wife's Transamerica policy had a cash value of $16,592.69 as of the date of the letter. However, this statement does not identify a surrender value or indicate whether this policy even includes a surrender value.

USCIS may consider personal, unencumbered and liquefiable assets that could reasonably be applied towards paying employee wages. However, in order for life insurance policies to be considered available for purposes of paying the proffered wage, such policies must include a surrender value.[9]

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[9] Cash Surrender Value is defined as the amount of money that an insurance company pays the insured upon cancellation of a life insurance policy before death and which is a specific figure assigned to the policy at that particular time, reduced by a charge for administrative expenses.

The cash surrender value of an insurance policy is not based upon its actual value, but upon its reserve value—the face amount of the contract discounted at a specific rate of interest according to the insured's life expectancy. Not all life insurance policies have cash surrender values; the terms of the policy must so provide. *West's Encyclopedia of American Law* (2nd Edition 2008) via http://legal-

Further, the petitioner must demonstrate that it is his intention to surrender such policies in order to pay the proffered wage. In this instance, only two of the policies identified show surrender values, one showing $14,337.99 in 2007 and another showing $2,718.73 in 2008. However, the petitioner has neither demonstrated that it was his intention to surrender these policies for purposes of paying the beneficiary the proffered wage nor demonstrated that he has already surrendered such policies.

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 petition had been in business for 20 years at the time the instant petition was filed. However, the petitioner has not established the historical growth of the 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 petitioner was 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.

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).

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dictionary.thefreedictionary.com/Cash+Surrender+Value (accessed April 25, 2012).

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)(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 four years of experience in the job offered: Japanese cuisine chef. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a chef at . in , Japan from October 1985 until April 1992.

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 an undated letter from , Chief Executive Officer of In his letter, Mr. states that the beneficiary worked for his organization from October 17, 1985 until May 19, 2001. Mr. indicates that the beneficiary "served as Restaurant Manager since April 1992, with responsibilities for management and food preparation."

On Form ETA 750B, the beneficiary indicated that he worked as a chef for from October 1985 until April 1992 with no other dates of employment identified. Mr. states that the beneficiary worked for his organization beginning in October 1985 and continuing until May 2001. Mr. states that the beneficiary functioned as a Restaurant Manager from April 1992 but says nothing specifically indicating that the beneficiary acquired experience as a Japanese chef from October 1985 until April 1992. Therefore, the letter provided as attestation of the beneficiary's experience does not corroborate the experience which the beneficiary claimed on Form ETA 750B.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988).

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.