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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 25 2012** OFFICE: VERMONT 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**DISCUSSION:** The preference visa petition, originally approved, was revoked by the Director, Vermont Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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.<sup>1</sup>

The petitioner is a restaurant. It seeks to employ the beneficiary<sup>2</sup> permanently in the United States as a cook. 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 the Internal Revenue Service (IRS) issued the petitioner a federal employer identification number (EIN) thereby casting doubt on the tax return submitted; therefore, the director did not recognize the tax return submitted<sup>3</sup> and, referencing additional petitions filed by the petitioner,<sup>4</sup> determined that the petitioner failed to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director revoked 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.

In his October 23, 2008 notice of revocation, the director identified the issues of whether or not the petitioner had been issued an EIN and whether or not the petitioner had the ability to pay the

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<sup>1</sup>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).

<sup>2</sup> This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

<sup>3</sup>The record before the director contained only a tax return for 2001. The record did not contain an annual report or audited financial statements.

<sup>4</sup>The petitioner the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2).

proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal, the AAO has identified another issue, whether or not the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

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.

**Successor-In-Interest**

The director's notice of revocation was based in part on the petitioner's inability to confirm its EIN by submitting a copy of the IRS letter issuing the petitioner its EIN.<sup>5</sup> The director concluded that while the petitioner had submitted a copy of a 2001 tax return with its petition, the director could not confirm by a search of public databases that the EIN listed on the tax return belonged to the petitioner. Therefore, doubt was cast upon the authenticity of the 2001 tax return submitted by the petitioner. On appeal, the petitioner has not submitted any evidence from the IRS regarding the issuance of its EIN.

This office has not been able to confirm the petitioner's EIN through a search of the Westlaw Federal Employer Identification Number database.<sup>6</sup> Additionally, this office has not been able to confirm the petitioner's existence at the time the labor certification and petition were filed. The labor certification was filed on April 26, 2001 in the name of [REDACTED]. The petition was filed on October 25, 2003 in the name of [REDACTED]. The petition at Part 5 states the petitioner was established in April 1998 and the tax returns submitted by the petitioner also indicate that the taxpayer was established in April 1998. However, the Commonwealth of Virginia State Corporation Commission website indicates that the petitioner was established on September 27, 2004,<sup>7</sup> which is after both the labor certification and petition were filed. The website further indicates that a corporation named [REDACTED] existed at one time, but information about this corporation has been purged from the Virginia website.<sup>8</sup>

<sup>5</sup>The petitioner lists its EIN on the petition as [REDACTED]  
<sup>6</sup>See [REDACTED] Westlaw [REDACTED] FEIN [REDACTED] database [REDACTED] at: [REDACTED]

<sup>8</sup>*Id.* This office's further research on Westlaw indicates that [REDACTED] was incorporated on March 3, 1998 and terminated on August 2, 1999 and that its registered agent was [REDACTED] at the petitioner's address. [REDACTED] Records database at: [REDACTED] ALL&vr=2.0&rp=%2fsea [REDACTED] 2013).

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity from the employer listed on the labor certification,<sup>9</sup> then it must establish that it is a successor-in-interest. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. The evidence in the record does not satisfy all three conditions.

### **Continuing Ability to Pay the Proffered Wage**

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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$11.57 per hour or \$24,065.60 per year. The Form ETA 750 states that the position requires two years of experience as a cook and that the applicant be literate.

On the petition, the petitioner claimed to have been established in 1998 and to currently employ 25 workers. The tax returns in the record are based on a calendar year. On the Form ETA 750B, signed

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<sup>9</sup>The petitioner, [REDACTED] could not have filed the petition on October 25, 2003 because it did not yet exist. Likewise, [REDACTED] could not have filed the petition because it was terminated on August 2, 1999.

by the beneficiary on October 17, 2003, 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 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 has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date of April 26, 2001 or subsequently.<sup>10</sup>

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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<sup>10</sup> The record contains copies of IRS Forms W-2 issued to the beneficiary by IHOP 471, Inc., EIN [REDACTED] for the years 2004-2007. However, [REDACTED] is an entity separate and distinct from the petitioner and there is no evidence in the record that [REDACTED] is legally obligated for the petitioner's debts. Thus, the Forms W-2 from [REDACTED] will not be considered as evidence of the petitioner's ability to pay the proffered wage.

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

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

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

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

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

The record before the director closed on February 11, 2008 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to revoke, at which time the record contained the 2001 tax return of [REDACTED]. On appeal, the petitioner submitted copies of tax returns for 2002 through 2007 for [REDACTED], therefore, 2007 is the most recent income tax return available. The tax returns for [REDACTED] demonstrate its net income for 2001 through 2007<sup>11</sup>, as shown in the table below.

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<sup>11</sup>The AAO will review all of the tax returns submitted, noting the following: (1) the 2001, 2002 and 2003 tax returns predate the petitioner's incorporation; (2) the petitioner has not established that the tax returns in the record are in fact its tax returns because it has not established that the IRS issued it an EIN; and (3) the petitioner has not established if and when it became a successor-in-interest. The petitioner remains responsible for establishing the predecessors' ability to pay.

- In 2001, the Form 1120S stated net income<sup>12</sup> of \$104,052.
- In 2002, the Form 1120S stated net income of \$152,825.
- In 2003, the Form 1120S stated net income of \$55,211.
- In 2004, the Form 1120S stated net income of -\$35,110.
- In 2005, the Form 1120S stated net income of -\$45,719.
- In 2006, the Form 1120S stated net income of -\$56,999.
- In 2007, the Form 1120S stated net income of \$21,263.

Therefore, for the years 2001, 2002, and 2003, [REDACTED] did have sufficient net income to pay the proffered wage; however, for the years 2004, 2005, 2006, and 2007, Sharp 570, Inc. did not have sufficient net income to pay the proffered wage. Further, the petitioner has not established its ability to pay the proffered wages for all of the beneficiaries of its pending petitions.<sup>13</sup>

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>14</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The tax returns of [REDACTED] Inc. demonstrate its end-of-year net current assets for 2004 through 2007, as shown in the table below.

<sup>12</sup>Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003), line 17e (2004-2005), and line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 12, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). The taxpayer's net income for the years 2001 through 2006 is found on line 21 on page 1 of its tax returns. Because the taxpayer had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2007, its net income is found on Schedule K of its tax return for 2007.

<sup>13</sup> Counsel notes that he has not been able to obtain copies of the other petitions filed by the petitioner and, therefore, evidence regarding those petitions including the proffered wages and priority dates has not been provided. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

<sup>14</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

- In 2004, the Form 1120S stated net current assets of \$133,433.
- In 2005, the Form 1120S stated net current assets of \$34,477.
- In 2006, the Form 1120S stated net current assets of -\$34,005.
- In 2007, the Form 1120S stated net current assets of -\$2,742.

Therefore, for the years 2004 and 2005, Sharp 570, Inc. did have sufficient net current assets to pay the proffered wage; however, for the years 2006 and 2007, [REDACTED] did not have sufficient net current assets to pay the proffered wage. Further, the petitioner has not established its ability to pay the proffered wages for all of the beneficiaries of its pending petitions

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, its net income, or its net current assets.

On appeal, counsel asserts that the petitioner is a subsidiary of [REDACTED]<sup>15</sup> and as such the petitioner has access to [REDACTED] abundant financial resources. Counsel further asserts that Holding has guaranteed the petitioner's wage obligations. As evidence, counsel submits a January 5, 2009 letter from [REDACTED] president of both the petitioner and [REDACTED] wherein [REDACTED] states that [REDACTED] owns and operates 13 different restaurant franchises. [REDACTED] also states that [REDACTED] provides financial support to the petitioner and whenever needed, [REDACTED] pays the petitioner's wage obligation.

As noted above, the record contains copies of tax returns for [REDACTED] which indicate the taxpayer is an S corporation and files a Form 1120S, including a Schedule K-1.<sup>16</sup> For the years 2001 through 2007, the taxpayer issued only one Schedule K-1 each year and it was issued to [REDACTED] as the sole shareholder. As such, [REDACTED] is the only owner of [REDACTED]. Therefore, even if we accept that the tax returns in the record are the petitioner's tax returns, there is no basis for counsel's assertion that the petitioner is a subsidiary owned by [REDACTED]

Counsel asserts that the petitioner has access to [REDACTED] abundant financial resources and that [REDACTED] has guaranteed the petitioner's wage obligations. Additionally, [REDACTED] in his January 5, 2009 letter, asserts that [REDACTED] provides financial support to the petitioner and whenever needed, [REDACTED] pays the petitioner's wage obligation. However, the record does not contain evidence to support those assertions. 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.

<sup>15</sup>The record contains tax returns for [REDACTED] for the years 2001 through 2007. The tax returns indicate it was established on January 1, 2001, its EIN is 5 [REDACTED] it is an S corporation, and its sole shareholder is [REDACTED]

<sup>16</sup>An S corporation reports a shareholder's share of income, deductions, and credits on Schedule K-1. See <http://www.irs.gov/pub/irs-pdf/i1120ssk.pdf> (accessed June 26, 2012).

158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The assertions of counsel and [REDACTED] 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 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 has not established that the tax returns in the record are its tax returns. The petitioner has not established the number of years it has been doing business, the historical growth of its business, its overall number of employees or its reputation within its industry.<sup>17</sup> There is no evidence of an uncharacteristic business expenditure or loss from which the petitioner has since recovered. There is no evidence whether the beneficiary is replacing a former employee or an outsourced service. Further, the petitioner has not established its ability to pay the proffered wages for all of the beneficiaries of its pending petitions. 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.

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<sup>17</sup> While the record contains an article regarding the reputation of the petitioner's shareholder with respect to his ownership of numerous [REDACTED] restaurants, it does not address the reputation of the petitioner itself.

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

**Beneficiary Qualifications: Experience**

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 (1<sup>st</sup> Cir. 1981).

In the instant case, regarding the experience requirement, the labor certification states that the offered position requires two years of experience as a cook. On the labor certification, the beneficiary claims to qualify for the offered position based on being employed by [REDACTED] in Lima, Peru from January 1998 to August 2001. However, this experience conflicts with the beneficiary's Form G-325A signed by him on October 17, 2003.<sup>18</sup> On the Form G-325A the beneficiary listed no employment during the time frame of October 17, 1998 through October 17, 2003. This inconsistency is not explained.<sup>19</sup>

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 August 31, 2001 from [REDACTED] General Manager of [REDACTED] on company letterhead, who states the beneficiary worked there as a cook from January 16, 1998 until August 31, 2001. The letter neither lists the beneficiary's duties nor states whether the beneficiary's employment was full- or part-time.

The evidence in the record does not establish that the beneficiary possessed the required experience

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<sup>18</sup>The Form G-325A requires an applicant to list employment for the previous five years. Thus when the beneficiary signed his Form G-325A on October 17, 2003, he was required to list all of his employment going back to October 17, 1998.

<sup>19</sup>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).

set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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

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

**ORDER:** The appeal is dismissed.