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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:

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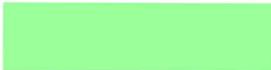
OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

Petitioner:



Beneficiary:

PETITION:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the director, Texas Service Center. The petitioner filed a motion to reopen and reconsider, which the director dismissed. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a secretary. 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 July 10, 2009 denial, the primary 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. The director found that the petitioner did not demonstrate the ability to pay the proffered wage in 2003 and 2004. On March 4, 2010, the director affirmed his decision to dismiss the petition on the basis that the petitioner failed to establish its ability to pay the proffered wage from the priority date onward.

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 January 24, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$415.00 per week (\$21,580.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered of secretary.

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.²

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1987 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a tax year beginning December 1 and ending November 30. On the Form ETA 750B, signed by the beneficiary on December 18, 2001, the beneficiary did not claim to have worked for the petitioner.³

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).

¹ The petitioner did not mail the DOL cover sheet for the labor certification. On the Form ETA 750, "2002" is handwritten and is in different color ink than other items written in ink. In any further filings, the petitioner should submit the cover sheet from DOL to exhibit the exact date of filing. 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).

² 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).

³ The record of proceeding contains a 2005 Form 1099-MISC tax document reflecting that the petitioner paid the beneficiary as early as 2005.

The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. The petitioner submitted the following Forms W-2 and 1099-MISC for the beneficiary:

- In 2002, there is no evidence of wages submitted.
- In 2003, there is no evidence of wages submitted.
- In 2004, there is no evidence of wages submitted.
- In 2005, the 1099-MISC stated that the petitioner paid the beneficiary \$21,844.⁴
- In 2006, the W-2 stated that the petitioner paid the beneficiary \$16,745 and the 1099-MISC stated that the petitioner paid the beneficiary \$8,615 which together total \$25,360.⁵
- In 2007, the W-2 stated that the petitioner paid the beneficiary \$28,555.
- In 2008, the W-2 stated that the petitioner paid the beneficiary \$27,035.
- In 2009, the W-2 stated that the petitioner paid the beneficiary \$26,840.

The W-2 and 1099-MISC statements show that the petitioner paid the beneficiary the proffered wage in years 2005 to 2009 and thus would establish that ability to pay for these years upon resolution of the issues set forth below. However, the tax summaries fail to demonstrate that the petitioner paid the beneficiary any wages or the proffered wage in 2002, 2003 or 2004. As such, the petitioner must demonstrate that it had the ability to pay the full proffered wage in 2002, 2003 and 2004.

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

⁴ It is unclear from the record why the petitioner paid the beneficiary on Form 1099 in the some years and on Form W-2 in other years. 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).

⁵ The beneficiary’s 2006 to 2009 W-2 statements do not state her address as required by the form. Although the record contains the beneficiary’s tax transcripts for a number of years, the transcripts exhibit joint filing for earnings with her husband and do not specify the source of income. The lack of address on the Forms W-2 raises issues concerning the veracity of the information contained therein and must be explained in any further filings before the W-2 forms can be definitively accepted. See *Matter of Ho*, 19 I&N Dec. at 591-92.

expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

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

The record before the director closed on August 11, 2009 with the receipt by the director of the petitioner's motion to reopen and reconsider. As of that date, the petitioner's fiscal year 2008

federal income tax return was not yet due. The record contains incomplete copies of the petitioner's tax returns for 2001, 2002, 2003, 2004, 2005, 2006 and 2007.⁶ The director gave the petitioner notice that the tax returns provided were insufficient to document its ability to pay the beneficiary's proffered wage for the years 2002, 2003, and 2004, in a Request for Evidence dated March 19, 2009, as well as in the director's decisions of July 10, 2009 and March 4, 2010.

The AAO will review evidence that is complete. The petitioner should submit any missing pages and schedules as noted above in any further filings. Because the petitioner's 2001, 2003 and 2004 tax returns are incomplete and missing Schedule K, the AAO is unable to examine the petitioner's net income for those years. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2002, the Form 1120S stated net income⁷ of -\$14,221.

Therefore, for the fiscal years 2001, 2002, 2003, and 2004,⁸ the petitioner did not have sufficient net income to pay the proffered wage.

⁶ The same years' tax returns were submitted multiple times – first with the original filing, next in response to the RFE and finally with the appeal. Most copies of the tax returns in the record of proceeding are incomplete either by virtue of missing pages and/or cut-off text. For instance, although the 2002 Form 1120S contains four primary pages without attached statements, the 2003 1120S submitted with the original filing contains page one only. The 2003 Form 1120S submitted with the RFE is missing pages three and four. The 2003 Form 1120S submitted on appeal is missing page four and relevant "statements." The 2004 Form 1120S submitted with the original filing contains page one only without additional statements. The 2004 Form 1120S submitted with the RFE is missing pages three and four and statements. The 2004 Form 1120S submitted on appeal is missing page four. Thus, none of the copies of the 2003 or 2004 tax returns submitted are complete. In any further filings, the petitioner must submit complete copies of its tax returns, including all pages and schedules as filed with the Internal Revenue Service.

⁷ 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 (1997-2003) or line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 27, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). The petitioner did not include copies of the complete Schedule K for years 2001, 2003, and 2004. Therefore, it is unclear if it had additional income credits, deductions, or other adjustments shown on its Schedule K for 2001, 2003, and 2004. For 2002, there were no additional income credits, deductions, or other adjustments shown on its Schedule K, therefore, the net income figure reported above is from line 21 of page one.

⁸ Even if we considered the petitioner's net income from page 1 of the tax return, the amounts in

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.⁹ 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. Because the petitioner's 2001 tax return is incomplete, the AAO is unable to examine the petitioner's net current assets for those years. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$21,230.
- In 2003, the Form 1120S stated net current assets of \$11,082.
- In 2004, the Form 1120S stated net current assets of \$62,655.

For the fiscal years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage. For 2004, the petitioner did have sufficient net current assets to pay the proffered wage. The petitioner failed to provide evidence of its net current assets for fiscal year 2001 thereby preventing the AAO from determining whether it had net current assets sufficient to pay the proffered wage.

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 petitioner paid commission for outside labor of over \$53,000 in tax years 2003 and 2004. However, commissions paid to other employees do not evidence the petitioner's ability to pay the proffered wage to this beneficiary. The wages actually paid to the beneficiary have already been considered above. Further, the petitioner's 2001, 2002, 2003 and 2004 tax returns do not indicate any wages and salaries paid,¹⁰ and do not indicate any costs of labor.¹¹ Statement 2 attached to the petitioner's 2003 return indicates expenses of \$15,634 in "commission paid." Statement 2 attached to the petitioner's 2004 tax return likewise indicates \$37,900 in commissions paid. As the fees were paid as commissions, it is not clear that the beneficiary would be

2001 (-\$15,596), 2003 (\$3,272) and 2004 (\$3,147), would be insufficient to establish the petitioner's ability to pay the proffered wage in these years. The petitioner's fiscal year 2001 tax return covers the time period December 1, 2001 to November 30, 2002, which encompasses the priority date.

⁹ 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.

¹⁰ IRS Form 1120S, Page 1, Line 8.

¹¹ IRS Form 1120S, Schedule A, Line 3.

performing the same work as a secretary where commissions are not standard. It is not clear that the beneficiary as a secretary could have replaced the labor paid based on commission. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).¹²

The petitioner has not established how the hiring of the beneficiary in 2005, purportedly as a secretary, alleviates the necessity for these commission payments. The record does not name these “commission” workers, state their wages, verify their full-time or part-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the workers, who are paid by commission, involves the same duties as those set forth in the labor certification, which is for a secretary. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If the commission-eligible workers performed other kinds of work, then the beneficiary could not have replaced them. Further, as noted above, in determining the petitioner's ability to pay the proffered wage, USCIS considers the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses – including commissions.

Counsel explains that the petitioner's business suffered for approximately two years as a result of the events of September 11, 2001 resulting in the “ensuing airline meltdown.” The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001; the record only contains an unsigned fragment of paper purportedly from the petitioner, which states that “[t]he 2002 Tax return reflects a loss, due to the September 11 incident. Most travel businesses closed down during this year, due loss [*sic*] of business.” The statement does not state that the petitioner's business closed down, or describe any impact specific to its business, nor does it provide any evidence showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The petitioner's tax returns, although incomplete, appear to support that conclusion, in that the petitioner documented comparable amounts of gross receipts or sales in each fiscal year from 2001, which began December 1, 2001, to 2004, which ended November 30, 2005. The record does not contain any evidence of the petitioner's financial strength prior to its fiscal year 2001 to

¹² As the petitioner's tax returns lack salaries paid to any employees for four years, this raises the issue whether the position represents a full-time bona fide job offer from the priority date onward. The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

support claims of a decline in income. Therefore, the evidence in the record does not support the petitioner's assertion.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since 2005, according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. 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 asserts that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges USCIS to consider the wage rate paid in 2005 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

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 January 24, 2002. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2002, 2003 and 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

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 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 *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, no evidence has been presented to show the petitioner's business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1987. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

In the instant case, the petitioner was incorporated in 1987 and, as of the date of filing the Form I-140, listed the number of employees as four. However, the petitioner's tax returns from 2001 to 2004 do not reflect any wages paid to employees, casting doubt on the size of its business operations. 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. at 591-92. The tax returns do not reflect a pattern of historic growth or the documented occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage as of the filing date and continuing through the present. The tax returns do not show any officer compensation paid in any year. In fact, the officer compensation entry is left blank on tax returns for years 2001 to 2007. 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.

Beyond the director's decision, the petitioner has failed to establish that the beneficiary is qualified for the position offered. The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The job qualifications for the certified position of secretary are found on Form ETA 750 Part A. In the instant case, the labor certification states that the offered position requires two years of experience in the position offered, secretary. Item 13 describes the job duties to be performed as follows: “answer tele; file; schedule app’ts; shorthand (80 wpm); type (60 wpm); using computer.”

The beneficiary lists her prior experience as an executive secretary with [REDACTED] in Colombo, Sri Lanka from an unspecified month in 1981 until July 2001. This is the only position listed on Form ETA 750. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The experience letter submitted lacks specificity. The record contains a letter, dated March 15, 2001, which appears to be unsigned and does not state the name of the writer, give the address of the employer, or list any other contact information, but has only [REDACTED] on the top of the page. The letter states that the beneficiary worked "with me directly for 2 ½ years." Her other positions with the company, if any, are unclear. The author also does not specify if the beneficiary was employed in a full or part-time status, thus preventing the AAO from determining the beneficiary's total length of experience.

Further, the record contains a second letter, dated November 10, 1993, from the Technical Supplies Manager [REDACTED] stating that during the manager's tenure, from February 12, 1991, to January 12, 1993,¹³ the beneficiary was employed as a secretary and general administrator. It does not list the beneficiary's actual dates of employment or indicate any employment prior to 1991 or after 1993. The [REDACTED] position is not listed on the ETA 750. 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. Further, 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. at 591-92.

In any further filings, the petitioner should submit an experience letter that complies with the regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A) and documents whether the experience was part-time or full-time to establish the total length of the beneficiary's experience. The petitioner must provide independent, objective evidence of the beneficiary's employment to overcome the inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Thus, the petitioner has failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

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, petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹³ Whether the dates are February 12, 1991 to January 12, 1993 or December 2, 1991 to December 1, 1993 is unclear as the dates were written "2/12/91 – 01/12/1993."